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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOSEPH L. SANAPAW,
WILLIAM J. GRIGNON,
FRANCIS BASINA,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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WILLIAM J. GRIGNON,
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Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners, enrolled Menominee Indians, pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Wisconsin, holding them criminally liable for violations of state hunting regulations.

OPINIONS BELOW

The opinion of the Shawano-Menominee County Court appears post, Appendix A. The opinion of the Wisconsin Supreme Court appears post, Appendix B, and is reported at —— Wis. ——, 124 N.W.2d 41 (1963).

JURISDICTION

Judgment for petitioners was entered by the County Court on March 1, 1963, nunc pro tunc as of November 8, 1962 (R. 137-8).[1] The Wisconsin Supreme Court reversed on November 1, 1963 (R. 148). Rehearing was denied on December 20, 1963 (R. 162). This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Long before Wisconsin became a state, the Menominee Indians hunted for subsistence throughout their vast aboriginal domain, subject to no restrictions but their own. Periodically their lands were reduced by treaty cessions, until finally, by the Treaty of 1854, they were left with a small reservation on the Wolf River, and on that reservation ever since they have continuously exercised their hunting rights free of any restrictions but their own.

In 1954 Congress provided for termination of the historic federal supervision over the Menominees, but failed to say whether this meant the tribe's hunting rights within the reservation would thenceforth be subject to state hunting rules, a result which would destroy any advantages of the rights; a result which would flout the 1854 Treaty as the Indians had always understood it, and subject the Menominee hunters to the same fees, seasons, bag limits and genteel methods as the white nimrod.

The question is whether Congress' silence wrought this abrupt change in the 1854 Treaty. The trial court held no, and the appellate court held yes.

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[1] The Record herein is numbered beginning with p. 101, through p. 163.

TREATIES AND STATUTES INVOLVED

Treaty of May 12, 1854, 10 Stat. 1064, between the Menominee Tribe of Indians and the United States.

Menominee Termination Act of 1954, as amended, 25 U.S.C. §§ 891-902, as made effective by Proclamation of the Secretary of Interior, April 29, 1961, 26 Fed.Reg. 3726.

Pertinent parts are reprinted post, Appendices C and D.

STATEMENT OF THE CASE

Origin of the Hunting Right

Since time immemorial the Menominee Indians have lived in eastern Wisconsin. After a series of major cessions, culminating with the Treaty of 1854 (and a minor cession in 1856), they were compressed onto a reservation of about 230,000 acres on the Wolf River, northwest of Green Bay, where they have lived ever since.

By the Treaty of St. Louis, 7 Stat. 153 (1817), the Menominee Indians acknowledged themselves to be under the protection of the United States, and the parties agreed there would be perpetual peace and friendship between them.

The Treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundaries of the Menominees' territory.

By the Treaty of Washington, 7 Stat. 342 (1831), they ceded some 3,000,000 acres of their aboriginal territory, and expressed a desire to remain under the "parental care and protection" of the United States. By

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[2] As amended, 7 Stat. 405 (1832).

[3] Article First.

the Treaty of Cedar Point, 7 Stat. 506 (1836), they ceded approximately 4,184,000 more acres.

By the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952 (1848), the Menominees ceded the balance of their lands in Wisconsin (estimated to contain about 4,000,000 acres),[4] in exchange for at least 600,000 acres west of the Mississippi. To give them time to explore their new lands, the Indians were to be permitted to remain on their ceded lands for two years, and thereafter until the President should notify them that the same were wanted.[5]

An exploration party of Menominees inspected the new lands, but reported that the lands were not suitable to the tribe's needs. The Menominees refused to move to the new lands. They claimed that the understanding in 1848 had been that if the new lands were not acceptable, they would be offered acceptable lands elsewhere.[6]

The Goverment extended the deadline for leaving, and suggested that they remove instead to a certain tract on Wolf River in Wisconsin, a little north of their then camping grounds. The proposed tract contained twelve townships, or 276,480 acres. The Menominees agreed and removed thither in the fall of 1852.[7]

The Government sought the permission of the state to the setting aside of the Wolf River reservation for the

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[4] Annual Report of the Commissioner of Indian Affairs, 1848, Ex.Doc. 1, 30th Cong., 2d Sess., p. 397-8.

[5] Article 8.

[6] Annual Report of the Commissioner of Indian Affairs, 1851, H.R. Ex. Doc. 2, Part III, 32d Cong., 1st Sess. pp. 266-67, 293. See also recitations in the Treaty of Wolf River, 10 Stat. 1064 (1854), post, Appendix C.

[7] Annual Report of the Commissioner of Indian Affairs, 1852, Sen. Doc. 1, 32d Cong., 2d Sess., pp. 295, 325. Congress appropriated $25,000 in 1852 to enable the Indians to move to the Wolf River Reservation. 10 Stat. 47.

Menominees, and on February 1, 1853, by joint resolution, the two houses of the Wisconsin legislature consented.[8]

In order to confirm the change, the 1848 Treaty was amended by the Treaty of Wolf River, 10 Stat. 1064 (1854)[9], whereby the Menominees retroceded the undesirable lands they had acquired under the 1848 treaty, and the United States confirmed to them the substitute Wolf River Reservation, "for a home, to be held as Indian lands are held . . . ." Nothing was expressly said of hunting rights, but as the Court of Claims found on the evidence in another case[10]

> "The basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.
>
> ". . . part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new treaty, was the fact that the tract in question contained swamp lands which were suitable for hunting."

In 1858 the Menominees ceded two of their twelve townships to the United States, for use of certain New

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[8] 1853 Wis.Jt.Res., Chap. 1, which states: "Resolved by the Senate and Assembly of the State of Wisconsin, That the assent of the State of Wisconsin is hereby given to the Menominee nation of Indians to remain on the tract of land set apart for them by the President of the United States on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows . . . ."

[9] The 1854 Treaty (prologue) states that it is "supplementary and amendatory" to the 1848 Treaty. See post, Appendix C.

[10] *Menominee Tribe* v. *United States*, 95 Ct.Cl. 232, 240, 241 (1942).

York Indians, 11 Stat. 679. The remainder, comprising about 230,000 acres, has remained their reservation to the present day. It has never been allotted, and remains today as in 1854 an intact tract of land, wholly owned by the tribe.[11]

Both courts below found that the 1848-1854 transactions left the Menominees with the right to hunt on their treaty reservation free of state restrictions (R. 112, 155). It is important to note that the holdings were not because of the state's general lack of jurisdiction over Indians on Indian reservations, but because the Indians' right to hunt on their reservation was inherently not subject to state restrictions unless Congress made it so.

Termination of Federal Supervision

In 1954, implementing the desire of the Government to "get out of the Indian business," Congress enacted the Menominee Termination Act.[12] The purpose of the Act was "to provide for the orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."[13]

A comprehensive program was authorized to implement the Act and to insure that the transition was not detrimental to the tribe. The tribe was to propose a plan for administration of tribal property and affairs. It was contemplated that the tribe would incorporate, the members would be stockholders, and the stockholders' powers would be exercised by a group of voting trustees. The Secretary of Interior was authorized to transfer to the

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[11] The technical form of ownership since 1964 has been that the land is owned by the tribal corporation, and the Indians are the sole shareholders.

[12] 68 Stat. 250, 25 U.S.C. §§ 891-902, see post, Appendix D.

[13] 25 U.S.C. § 891.

tribal corporation, on or before April 30, 1961, all tribal property held in trust by the United States.[14]

The Act provided that upon transfer of the property to the tribe, the Secretary was to publish a proclamation of that fact and—[15]

> "Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Emphasis added.)

The Act was silent about preservation of hunting and fishing rights, although it did require that the tribe's plan contain provisions for the protection of its fish and wildlife.[16]

The legislative history shows that the subject of hunting and fishing rights was brought to Congress' attention, but that Congress remained inscrutable on that subject. The bill which was ultimately enacted (H.R. 2828, 83d Cong.) was silent as to hunting and fishing rights. Other bills (S. 2813 and H.R. 7135) would have expressly preserved any such rights, whether based on treaty, statute, custom, or judicial decision. The tribe naturally supported S. 2813 and H.R. 7135, to preclude any doubts that its rights were preserved, and the tribe's attorney, there-

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[14] 25 U.S.C. §§ 896, 897.

[15] 25 U.S.C. §899.

[16] 25 U.S.C. § 896. This suggests exclusive tribal jurisdiction over fish and wildlife, because Congress must have been aware that state regulations alone, had Congress thought them applicable, would probably afford adequate protection of fish and wildlife.

fore, argued that the H.R. 2828's silence, coupled with the general clause that the Indians would be subject to state laws (italicized in the quotation of Sec. 899 above), might impliedly abolish the tribe's hunting and fishing rights. He testified—[17]

> ". . . the statement is made that H.R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have. Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

On the other hand, two representatives of the Department of Interior understood that H.R. 2828's silence would leave undisturbed all *treaty* hunting and fishing rights which the Indians might have, but would repeal any *statutory* hunting and fishing rights (though they knew of none in existence and none are involved here).[18]

This understanding of the Department of Interior was later promulgated as an official policy. On July 2, 1956, in an official memorandum to all Area Directors of the Bureau of Indian Affairs, the Commissioner of Indian Affairs stated:

> ". . . the Bureau's policy [with respect to termination] will be to protect and preserve any right, privilege or immunity with respect to hunting, trapping or fishing afforded to any Indian or Indian group by Federal treaty, agreement or statute . . . ."[19]

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[17] Joint Hearings on H.R. 2828 Before Subcommittees of the Senate and House Interior and Insular Affairs, 83d Cong. (March 10, 11, 12, 1954), p. 697.

[18] Id, pp. 588, 629. Quoted by the court below (R. 157-8).

[19] Reprinted post, Appendix E.

The Commissioner went on to make clear that this policy would apply to implied treaty rights as well as express ones, unless and until the courts should hold otherwise.

Pursuant to the Act, the Secretary's proclamation of termination was published on April 29, 1961, and the reservation was conveyed intact to the new tribal corporation.[20] Prior to termination, it is agreed by all, tribal hunting rights on the reservation were not subject to state restrictions. Thereafter, the State of Wisconsin took the position that state restrictions did apply.[21]

Proceedings Below

This suit arose when the state prosecuted petitioners for unlawfully hunting deer on the reservation with the aid of an artificial light and for unlawfully transporting a loaded and uncased gun in an automobile, on September 8 and 9, 1962 (R. 131-132, 140-141). Petitioners do not

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[20] The proclamation appears at 26 Fed.Reg. 3726.

[21] A small sample of state hunting restrictions includes the following:

Hunting licenses are required, with fees ranging from $2 to $10. 4 West's Wisc. Stat. Ann. §§ 29.10, 29.105, 29.13, 29.132, 29.371. A "sportsman's" license can be bought for $6.50. Id. § 29.147.

Certain game can never be taken: for example, quail, prairie chicken, turkey, mourning doves, plovers, badger, woodchuck, moose, elk, flying squirrel, white deer. Wisc. Admin. Code § WCD 10.01(2)(e), 10.03.

Permitted game may be taken only during certain seasons, and subject to daily bag limits. For example, partridges, up to three per day, may be taken between Oct. 19 and Nov. 24 only. Id. § WCD 10.01(2)(d). Squirrels, up to five per day, may be taken between Sept. 28 and Jan. 31. Id. § WCD 10.01(3)(a). Deer, one a day only, may be taken between Oct. 15 and Dec. 1. Id. § WCD 10.01(3)(e).

Prohibited methods include, for example, night hunting, § WCD 10.06; use of nets or snares, § WCD 10.07(2); shooting birds with rifles, § WCD 10.07(5); hunting deer or bear in water, § WCD 10.10(2); use of bows of less than 30 lbs. pull, § WCD 10.11; hunting from a motorboat, § WCD 10.12(1)(a); tending traps at night, § WCD 10.13(3).

dispute that they committed the acts complained of, but take the position that Termination did not subject their tribal hunting rights to state restrictions (R. 134-135).

The trial court agreed with petitioners (R. 101-120), reasoning that the Termination Act, being silent on the matter, did not abrogate the tribe's prior hunting rights.

The court noted and concurred with the similar case of *State* v. *Pearson*, decided by an Oregon trial court (reprinted in post, Appendix F, and discussed post at p. 12), holding that the Klamath Tribe's hunting rights were not subjected to state restrictions by the Klamath Termination Act.

The state brought writs of error in the Wisconsin Supreme Court (R. 139-140). On November 1, 1963, that court reversed, one judge dissenting (R. 149-161), and held that the tribal hunting rights were subject to state restrictions:

> "It is our conclusion that the express provision of Sec. 899 of the Termination Act that 'the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,' includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation." (R. 159)

The court did not see fit to cite the conflicting *Pearson* case in Oregon.

REASONS FOR GRANTING THE WRIT

1. The question raised controls the vitally important hunting and fishing rights of the entire Menominee Tribe, which has over 3,200 enrolled members. The tribe has always suffered a high incidence of poverty and unem-

ployment, and as a consequence a substantial proportion of its members still rely to an important extent on hunting and fishing to supplement their diet, as indeed they have since time immemorial.[22]

2. The question is important not only to the Menominees, but to the many other Indians who have been terminated.[23] And as termination of Indian tribes is a continuing policy of Congress,[24] it is to be expected that other tribes will be terminated in the future, and that the question raised herein will be important to them.

3. The question raised is already under litigation with respect to one of the other terminated tribes, and already there is a conflict of decisions. An Oregon state district court[25] and a federal district court in Oregon[26] have both ruled in favor of the Klamath Indians on facts essentially similar to those in this case. It is noted that

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[22] This fact was alluded to by the trial judge, who was personally familiar with the situation, when he stated:

"Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help." (R.117)

[23] Klamath Indians, 25 U.S.C. § 564 (enacted 1954); Mixed-Blood Ute Indians, 25 U.S.C. § 677 (enacted 1954); Western Oregon Indians, 25 U.S.C. § 691 (enacted 1954); Alabama & Coushatta Indians, 25 U.S.C. § 721 (enacted 1954); Paiute Indians, 25 U.S.C. § 741 (enacted 1954); Wyandotte Indians, 25 U.S.C. § 791 (enacted 1956); Peoria Indians, 25 U.S.C. § 821 (enacted 1958); Ottawa Indians, 25 U.S.C. § 841 (enacted 1956); Ponca Indians, 25 U.S.C. § 971 (enacted 1962).

[24] H.Con.Res. 108, 83d Cong., 67 Stat. B-132 (1953).

[25] *State* v. *Pearson*, Klamath Cy.Dist.Ct., No. 61-792-C, November 30, 1961, reprinted post, Appendix F.

[26] *Klamath & Modoc Tribes* v. *Maison*, U.S.D.C.Ore., No. 8081, December 10, 1963, reprinted post, Appendix G.

the Klamath Treaty, like the Menominee Treaty, was silent on hunting rights, but the courts, like the court below, had no difficulty finding implied treaty rights.

In *State* v. *Pearson*, a member of the Klamath Tribe was charged with illegal possession of deer meat, within the former Klamath Reservation. The court sustained a demurrer, holding that prior to termination the Klamaths had the right to hunt and trap on their reservation free of state restrictions, and since the Klamath Termination Act did not provide for abrogation of this right, the right still existed. The case was not appealed, and remains the only state court decision on the point.

Klamath & Modoc Tribes v. *Maison* arose because the State of Oregon, notwithstanding the *Pearson* decision, continued to prosecute and harass Klamath Indians for hunting in violation of state restrictions. The tribe sued to enjoin the state. The court held that the tribe had the right to hunt and trap on tribally owned lands, free of state restrictions. This case has been appealed to the Ninth Circuit.[27]

4. We cannot speak for the federal government, but a defeat for the Menominees would tend to frustrate the government's policy to persuade other tribes to terminate. These other tribes would say, "We are afraid to terminate. Look what happened to the Menominees."

5. Indian hunting and fishing rights are a matter of great public interest in many states, particularly Alaska, Idaho, Minnesota, Montana, Oregon, Washington and Wisconsin. All of these states have attempted in the name of conservation to diminish or abolish Indian hunting and fishing rights, since the famous *Tulee* case in

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[27] No. ....., Ninth Circuit Court of Appeals.

1942.[28] The matter has been productive of much dispute and emotion because the existence and scope of the rights have not been fully explored and settled by the judiciary.

6. If the holding of the court below[29] becomes final, then presumably the United States will have to pay just compensation for the taking of the hunting rights. It is well established that Indian hunting and fishing rights are property, and it is a fact that the only advantage of the right in this case, over the rights enjoyed by the public at large, is the freedom from state restrictions. To remove that advantage is to destroy the property altogether in this case, and for such a destruction the tribe would be entitled to just compensation.[30]

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[28] *Tulee* v. *Washington*, 315 U.S. 681 (1942).

ALASKA: *Kake Village* v. *Egan*, 369 U.S. 60 (1962), *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962); and *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949).

IDAHO: *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), *cert. den.* 347 U.S. 937; *State* v. *McConville*, 65 Ida. 46, 139 P.2d 485 (1943).

MINNESOTA: *State* v. *Jackson*, 218 Minn. 429, 16 N.W.2d 752 (1944).

MONTANA: *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954).

OREGON: *Klamath & Modoc Tribes* v. *Maison*, —— F.Supp. —— (D.Ore. 1963); *State* v. *Pearson*, Klamath Cy.Dist.Ct., November 30, 1961; and *Maison* v. *Confederated Umatilla Tribes*, 314 F.2d 169 (9th Cir. 1963), *cert. den.* 375 U.S. 829; *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 634 (1956).

WASHINGTON: *State* v. *McCoy*, —— Wash.2d ——, 387 P.2d 942, (1963); *State* v. *Satiacum*, 50 Wash.2d 513, 314 P.2d 400 (1957); *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951); *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), *cert. den.* 330 U.S. 827; *McCauley* v. *Makah Tribe*, 128 F.2d 867 (9th Cir. 1942).

WISCONSIN: *State* v. *Sanapaw*, decision below.

[29] To the effect that the Indians' right to hunt free of state conservation laws on their reservation had been "abrogated" by the Termination Act. (R.159)

[30] When the fishing rights of various Columbia River tribes were destroyed by The Dalles Dam, the tribes and the Army Engineers,

CONCLUSION

The petition should be granted.

Respectfully submitted,

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after long negotiation, agreed that the tribes should receive compensation of $27,000,000, which Congress paid. See *Whitefoot* v. *United States*, —— Ct.Cl. ——, 293 F.2d 658, 672 (1961), *cert. den.* 369 U.S. 818.

APPENDIX A

DECISION OF THE SHAWANO-MENOMINEE COUNTY COURT, BRANCH NO. 2, MENOMINEE COUNTY DIVISION

November 1, 1962

PAGE OF RECORD

101 The issues of this case are very clearly drawn. It is the contention of the state as outlined in the opinion of the Attorney General and oral argument by District Attorney Fritz Eberlein of Shawano-Menominee County,

(1) That the right of hunting and fishing were not granted and not included in the treaties of 1854 and 1856.

(2) That Congress has plenary powers to deal with the Indians and may abrogate Indian privi-
102 leges and rights, including treaty rights, by statute. Further that the lands here involved are part of the public domain.

(3) That Public Law 399 and supplementary acts terminate the hunting and fishing privileges heretofore enjoyed by Menominee Indians within what was formerly the Menominee Indian Reservation, now Menominee County.

The defense contends,

(1) That the treaty of 1854 provides that the lands are to be held as Indian lands are held.

(2) That the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.

(3) That the termination act (assuming that Congress had the right to terminate hunting and fishing privileges) did not by its terms so provide.

PAGE OF RECORD

That the tribe according to the act still exists as such and likewise all lands and property of the tribe is now held by the enrolled members of the tribe as the only stockholders of the Menominee Enterprises, Incorporated, who according to the act were the designated recipients by the tribe. That the members of the tribe have the right to quietly enjoy hunting and fishing and dwelling thereon free from molestation from the United States and it follows that the State of Wisconsin lacks jurisdiction to enforce the hunting and fishing laws in Menominee County.

103 The briefs and opinion submitted are exhaustive and complete as to adiudication of somewhat similar issues in both federal and some state courts. The facts of this case present issues not definitely passed on by our courts.

The court is of the opinion that it is apropos to the issues herein to discuss the historic background.

It seems that all lands on this planet suitable for habitation and survival was occupied by certain ethnic groups. Curiosity and a means of travel resulted in what history has called discovery of new continents. If the Indians of North America had landed in Europe it no doubt would have been called an invasion. Columbus in a rather touching ceremony took possession of some islands in the West Indies for Queen Isabell of Spain. Some gold was brought back to Spain and then the disease of discovery spread. France got into Canada and the Northwest Territory and later what was called the Louisiana Purchase. Spain took possession of Cuba and various areas in South America and what is now known as Florida. England staked out claims on the North American conti-

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nent from Maine to Florida. The Dutch obtained a rather uncertain rights in New York and made history by purchasing Manhatten Island for the sum of $24. At the times of the various nations above referred to attempted to take possession and colonize their respective areas of the North
104 America continent and subsequent thereto it was apparent that practically the entire North American continent was occupied by aborigines, later called Indians. It is true that the population and occupancy of the continent was not dense, but the fact did remain that there was a consistent occupation of all areas; that there were areas between the varying tribes, and there were many of different size and numbers, which area was more or less fought about and disputed by the Indians for hunting and fishing grounds, but that the pattern of occupancy was more or less consistent and that they regarded certain areas as their own private domain and at that time and subsequently thereto maintained that they had the title to said lands and the inherent right of hunting and fishing, which with some slight agriculture was their means of livelihood. The seaboard colonization proceeded rapidly until the time of the American Revolution which determined the colonies as an independent nation. Colonization and possession of lands for use of settlers proceeded systematically and fundamentally by power and strength of what we might call the colonist invaders. Firearms, of course, played a very important part. History indicates that William Penn recognized the title of the Indians and did negotiate a purchase. At this point it could be well remembered that purchasing the land from the Indians in reality meant nothing. What few dollars or goods that were paid was

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105 a poor substitute for the loss of their lands and in no way changed their method of life. It might be pointed out merely for the basis of comparison that the European countries colonizing Africa and staking out claims thereon were not as successful as in their occupancy of the North American continent, primarily perhaps because of the density of population in the African area, and we today see these countries with drawing and leaving the title and possession of the claimed land entirely in the hands and under the control of the inhabitants of the respective areas.

After the Revolutionary War the expansion of settlers to the West, part by natural increase and others by imigration spread most rapidly west to the Mississippi River, and we might point out that colonization or expansion by movement of settlers took possession of what lands or locations they wanted independent of claims of title thereto on the part of Indians. It was somewhat prior to 1848, which date Wisconsin was admitted to the Union, that specific issues between Indians and White settlers and the United States Government took a marked change as to rights. We are now to the point where Indians are displaying a certain type of anxiety, desire of maintenance of rights to the land so that there were issues which could no longer be passed because of the insistence on the part of the Indians and the potential
106 threat of possible bloodshed where settlers were moving in on definitely proclaimed Indian lands.

The Menominee Indians at this time were definitely located in Wisconsin, and from what transpired it is very apparent that the Menominee In-

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dian chiefs fully recognized the problem and were more or less compelled to negotiate a treaty, and it must be very apparent that at this time the Menominee chiefs recognized what had transpired from the Atlantic seaboard to the Mississippi River, and that unless they could negotiate some suitable agreement that they would be pushed out of the Wisconsin area, which to them was an exceptional area for wildlife, fish and fertility of soil.

History does not record the respective details of the transaction though there is enough in written nature to understand the background and motives of the bargaining that took place.

It must be remembered that the expansion from the Allegheny Mountains to the Mississippi River was fraught with many encounters, claims and counterclaims, and the occupation by might, and that the government during this time became more and more and more alert to the necessity of allocations of tribes to certain areas, and from the Indian viewpoint at the conference table it made survival a way of life and that the area to which they were to be concentrated or moved to must be sufficiently prolific to provide for their
107 sustenance. It is fair to assume that the treaty contracting parties were aligned, one with the background of power and force, and the other with a plea for protection from enemies and opportunity to maintain their way of life.

A treaty was drawn, and it must be remembered, also, that in the Indian's mind had been built up a picture of the great White Father at Washington who in all matters according to Indian lore and mind was the essence of fairness and right. Just what in substance was the contract or

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treaty between the contracting parties? On the one hand the Indians released or quit claimed or gave warranty deed according to their custom to the federal government of millions of acres of land. How much of the State of Wisconsin has not been disclosed, but it is only fair to assume that many million acres were included, for which in return they were to receive a tract of land of some six hundred thousand acres. According to records the government attempted to give them land across the Mississippi. This held up the transaction because of inspection on the part of Indians, and it was disclosed after examination that that was entirely unsuitable for Indians purposes and livelihood, and that the government agreed to protect them from their enemies and protect them in their right and claim to this land. It was theirs before the treaty but by the treaty the government guaranteed it to them as against all others and agreed to hold it in trust, they to act as guardian or trustee, the Indians to be wards of the government, the government to supervise and no doubt assist as has later proved to be the policy that must have been the outgrowth of the government's obligations under the treaty.

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It is obvious that the government negotiated from a power-laden hand and if the transaction were to be regarded on a mutual monetary basis it would seem that the Indians were substantially short-changed. The lands that the government received was promptly a part of the public domain and was deposed by the government as such. It would appear that the land reserved which is now Menominee County never became a part of the public domain. It would, also, appear as progress

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and changes in life and methods of living proceeded through the years that the Indians became a problem and that the government had to assist more than was originally anticipated and that the Indian's way of life could not entirely support him and it became quite costly for the government to continue the supervision agreed upon, and now the picture has definitely changed to the point that the government acting through its Congress was hopeful to unload their responsibilities, and again at the so-called conference table Public Act 399 resulted in what may be called another treaty with the Indians. The act speaks for itself. In reading it and the foregoing resolu-
109 tions before the act was passed indicate that hunting and fishing privileges and the Indian way of life were calculatingly omitted. To the Indian today it appears that the government drove a sharp bargain or was trying to enlarge the benefits for other Wisconsin citizens by permitting others to enjoy the hunting and fishing privileges. It is this point that brings to a crisis that issue.

Shortly after the 1848 period as settlers consistently and persistently moved westward across the Mississippi the Indian in the West recognized the slow and deadly push resulting in loss of hunting grounds and a forced change into a way of life that we find open rebellion, antagonism and the Indians in conflict attempting to maintain their rights and title. Teddy Roosevelt in his famous book *THE WINNING OF THE WEST* does not correctly portray the one-sided conflict in which power and the authority and the decisions of the government were maintained by force: resulting in considerable bloodshed but with the victory on the part of the government and the Indian now

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trying in various areas to recoup financially what he lost territorially.

In dealing with the problem from its very origin to date it, of course, was the Congress that set the pace by legislation. Originally Indian problems were solved by treaty. As we understand a treaty it is a formal agreement between two or more nations relating to peace, alliance, trade, etc. Con-
110 tracts generally speaking may be broken by either party but the party so doing can naturally be held in damages that result from a breach.

Congress determined that Indian matters would be handled by acts of Congress. Future treaties were out, but existing treaties should be inviolate unless changed by mutual consent. In this way no longer were Indian tribes treated as individual nations, but rather as American subjects entirely dependent on the grace of the fairness of Congressional action. So it became a government by statute covering Indian problems. The courts seem to have sustained this view in a certain respect as some of the decisions indicate that Congress had the plenary power over Indians and Indian lands. To this court it looks as if Congress grasped the crown and maintained its position by this method of power and that all supervision, privileges, rights were entirely within the grace of Congress. If this is the correct theory and right of procedure it would seem that the only saving grace for the Menominee tribe and their reservation is that their treaty is inviolate and that their rights to the Menominee Reservation, now Menominee County, arises from said treaty and cannot be changed without their consent nor by any unilateral act of the Congress. This position the

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courts have approved as indicated in decisions hereinafter referred to.

111 The position of the state and the defense are practically at direct variance. In the supplemental opinion or brief of the Attorney General it is seriously contended that the entire issue revolves around the fact that the Menominee Reservation prior to the treaty hereinbefore referred to was part of the public domain and that the state's position rests firmly on this ground. Let's view this position in the atmosphere and facts surrounding the treaty of the government with the Menominees. It does not specifically appear from the evidence in this case whether the Menominee Reservation so to speak was included in the grant from the tribe to the government. Nor is the court able to determine whether the state's position is that it was included in the treaty but because of the delay of two years in selecting a proper location satisfactory to the Indians that the Menominee Reservation during that interim became a part of the public domain. It appears to this court without even the slightest of doubt, first, that the title to the Reservation originally vested in the Indians and that the essence without even a serious doubt of the treaty entered into contemplated and intended that even if the lands were granted to the government the government returned them with the incident of hunting and fishing included. Any other view of what transpired is inconsistent with all the factual bargaining and understanding between the parties. It was definitely under-
112 stood that the Indians were to receive the right and title in the same absolute position as they originally held it. Their way of life, hunting, fishing and limited tilling of the soil, was the entire

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essence of the treaty, the government guaranteeing this and, also, agreeing to protect them from enemies and to supervise them.

It would be unworthy of our government to take any other position. It must, also, be remembered that since the creation of the reservation up to the date of termination the Indians exercised the complete right of supervising their own hunting and fishing regulations without regulation or prohibition of any kind on the part of the government. At this point we wish to point out for whatever it is reasonably worth that the Menominee lands were designated as the Menominee Indian Reservation. The very term "reservation" indicates that it was land reserved by them for their use.

The Indians never having, therefore, granted away their inherent aboriginal right of hunting and fishing therefore still possess those rights, not only up to the time of termination but as we will conclude later even after termination. Authority for this position is well-founded in the treaty itself and several decisions of both the United States and state courts. While there are many others that touch upon this right, perhaps the most im-
113 portant first is a provision in the Treaty of 1854. Article 2 provides as follows:

> "In consideration of the foregoing cession the United States agrees to give, and do give the said Indians for a home, to be held as Indian lands are held that tract of Country lying upon the Wolf River in the State of Wisconsin."

The 1854 treaty then designated a "reservation" for them "to be held as Indian lands are held." Thus, the Menominee Tribe has continuously ex-

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ercised the exclusive and unlimited hunting and fishing rights in question. The 1854 treaty being characterized by the parties as "supplementary and amendatory to the treaty" of 1848, merges the treaty of 1848 so that there is no proper basis for saying that the tribe ever did actually lose its rights in the land ceded.

The fact that no express retention or grant of exclusive and unlimited hunting and fishing was set forth in either treaty does not alter the conclusion, this principle was well state by the solicitor of the Department of Interior as follows,

"The examination of various treaties between the United States and the Chippewa Indians disclosed that while the right in the Indian to hunt and to fish on ceded land was reserved in some of the earlier treaties . . . no reservation of the right to hunt and to fish was made with respect to the unceded lands of the Red Lake Reservation, but such a reservation was not
114 necessary to preserve the right of the lands reserved or retained in Indian ownership. *The right to hunt and to fish was a part of the larger rights possessed by the Indians in the land used and occupied by them.*"

Such right was, "*not much less necessary to the Indian and his existence than the atmosphere they breathed remained in them unless granted away,*" United States vs. Winans, 198 United States 371, (OP., Acting Sol. IDM 28107, June 30, 1936).

The United States Supreme Court stated in United States vs. Winans, 198 United States 371, 381 (1905),

"The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians . . . the reservation where

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in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein they imposed a servitude upon every piece of land as though described therein and the right was intended to be continuing against the United States and its grantee as well as against the State and its grantee."

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as State vs. Johnson, 212 Wis. 301; 249 N. W. 285, held as follows:

115 "While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them, *The Treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (U. S. v. Winans 198 U. S. 371, 25 S. Ct. 662, 664; 49 L. Ed. 1089) We entertained no doubt the right of Indians to hunt and fish upon their lands continued."

We will now consider whether the termination act, Public Law 399 and the subsequent amendments thereto, in any way limits the right of the tribe as to their hunting and fishing privileges. It is the opinion of the court, first, that the Congress did not have a right to terminate or change the rights obtained by treaty. But if this opinion is differed with, may we point out that the act is

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strangely silent and neither directly or indirectly according to a fair interpretation of that act are the hunting and fishing privileges terminated. The preamble of the act provides,

> "The purpose of this act is to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."

116 Section 7 reads in part as follows,

> ". . . the responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof because of their status as Indians, shall cease on December 31, 1960 or on such earlier date as may be agreed upon by the tribe and by the secretary. The termination plan shall contain provisions for protection of the forest on a sustained yield basis and for the protection of water, soil, fish and wildlife."

The provisions of Section 7 providing that the termination plan shall contain provisions for the protection of the forest on a sustained yield and for the protection of water, soil, fish and wildlife, definitely indicates that soil, fish and wildlife are to be protected or reserved and this definitely indicates that this was considered and it naturally follows that it must be for the benefit of the tribe.[1]

Section 8 directs that the Secretary of the Interior to transfer to the tribe the title to all property real or personal that is held in trust by the United States for the tribe, and specifically authorized the formation of a corporation for the purpose of taking title to all tribal lands and

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[1] Addendum (R. p. 54)

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assets and enterprises owned by the tribe or held in trust by the United States.

117 The termination act did not eliminate exclusive hunting and fishing rights owned by the Menominees under the treaties of 1848 and 1854.

By termination the government saved the cost of supervision and so forth. This became a costly and serious obligation as time went along under the terms of the treaty. The termination on the part of the government is based not alone to obviate the costs of supervision, but also on the factual assumption that in todays modern way of living they are self-sustaining, that during years of supervision the government has so advanced and prepared them.

Almost any day in this court the silent tragedy continues. Young Indians, both male and female, and even the older ones with no employment supplement the modern way of life by theft and pawning. Fiscal aid by the government since termination is self-evident that the termination was premature. Hunting and fishing is not in itself a sufficient supplement to the modern way of life, but it does help.

The right of hunting and fishing is more important and vital to the Menominee than the right of all of Wisconsin or United States citizens to invade it.

The termination act provides in substance among other things that the property be conveyed or assigned as agreed on by the Menominees. Actually a corporation was formed designated as
118 Menominee Enterprises, Inc., its stockholders being the enrolled members of the tribe at the time that the rolls were officially closed. The reservation, therefore, was not actually allotted but it is

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still owned by the tribe. This mere conveyance is not a conveyance to a third party but to the Indians themselves. It should, also, be noted that there is provided in the act a way of life for the Indians by a provision that the property be operated on a sustained yield. The other way of life, namely by hunting and fishing, is not in any way referred to. But the inclusion of the sustained yield is indicative that the termination act was intended to solidify the tribe in their holdings and in their use. We must, therefore, conclude that the termination act in no way terminated the hunting and fishing rights that are now at issue in this case.

As we have heretofore pointed out this issue has been the subject of controversy, litigation and decision on the part of both state and federal courts. One of the most recent decisions which this court feels embodies the facts and the principles of law involved is the case of the State of Oregon vs. Harry Pearson determined in the District Court of the State of Oregon for the County of Klamath. The defendant was accused of illegal possession of deer meat in the County of Klamath within the area formerly known as the Klamath Indian Reservation without having obtained a deer
119 tag for the possession thereof. Quoting from the opinion as follows:

> "The question was whether the individual Indians who were members of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, hereafter referred to as the Klamath Indians, retain the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U. S. C. A. 564).

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"In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Bank of Snakes, as Individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, according to their culture. The right to hunt was a substantial portion of their subsistance, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time."

In the opinion the court quoted extensively the decision of State of Wisconsin vs. Johnson, 212 Wis. 301. Also the United States vs. Winans, and the court's concluding opinion is as follows,

"The case of United States vs. Winans and the above mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants
120 to them but from them to the government; therefore, that they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication. Since the Klamath Termination Act as amended did not specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefore, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon."

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In accordance with the foregoing opinions this court is of the opinion that the State of Wisconsin is without jurisdiction and that the defendants are not guilty of the crimes charged. Formal motion for dismissal and discharge of the defendants will be heard November 8, 1962, at 2:30 p. m.

Dated: November 1, 1962.

BY THE COURT:

R. H. FISCHER
County Judge

APPENDIX B

DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN

November 1, 1963

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149 ERROR to review two judgments of the county court of Shawano-Menominee counties: J. H. FISCHER, Judge. *Reversed.*

Criminal prosecutions by the state against defendants Joseph L. Sanapaw, William J. Grignon, and Francis Basina for violation of certain game laws.

150 The actions were commenced by complaint and warrant. Sanapaw and Grignon were charged together in one complaint, while Basina was charged singly in a separate complaint. All three were charged with hunting deer with the aid of an artificial light in violation of sec. WCD 10.10 (2), Wis. Adm. Code, and with transportation of a loaded and uncased gun in an automobile in violation of sec. WCD 10.07 (3), Wis. Adm. Code. Sanapaw and Grignon were charged with having committed their offenses on September 8, 1962, and Basina was charged with having committed his on September 9, 1962. Pleas of not guilty were entered. Defendants admitted, and the court found, that the alleged violations were in fact committed. The court, however, found defendants not guilty because they were enrolled members of the Menominee Indian Tribe and the state had no jurisdiction to enforce its hunting and fishing regulations against them.

The court, pursuant to sec. 958.12 (1) (d), Stats., granted the state permission to prosecute

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writs of error to review the judgments of acquittal. By agreement of the parties the two writs of error have been submitted together because the cases present a common question of law.

151 CURRIE, J. The question presented by the writs of error is:

Upon termination of federal supervision and control over the Menominee Indian Tribe and the Menominee Indian Reservation, did the enrolled members of the Tribe and their lands become subject to the same Wisconsin game laws as other persons and lands within the state?

In order to resolve this question it is necessary to review the pertinent historical facts. These commence with the treaty of October 18, 1848, between the United States and the Menominee Tribe (9 U.S. Stat. at L. 952). By this treaty the Menominees ceded, sold and relinquished to the United States "all their lands in the State of Wisconsin wherever situated."[1] The treaty further provided that, in consideration for this cession, the United States give the Indians "for a home, to be held as Indians' lands are held" a large tract of land west of the Mississippi river, and that the Menominees "shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the

[1] The boundaries of the area ceded to the United States under this treaty, which form a wedge-shaped tract located in east-central Wisconsin, are shown on Map "Wisconsin 1," Royce, *Indian Land Cessions*, Part 2, H. R. Doc. No. 118, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution (1896-1897). The figure 271, which is superimposed upon this area of the map, is explained at pages 780-781. The approximate boundaries of this area are also shown on a smaller map appearing in Raney, *Wisconsin—A Story of Progress*, at page 78.

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period of two years from the date hereof and until the President shall notify them that the same are wanted." In 1850 an exploring party found that
152 the lands west of the Mississippi were unsuited to the Menominees' circumstances. As a result they then petitioned the President for permission to stay longer on the ceded lands. Thereafter, Elias Murray, Superintendent of Indian Affairs, accompanied by three of the Menominee chiefs, explored lands on the Wolf and Oconto rivers in Wisconsin, and Murray recommended as a home for the Menominees a tract 30 by 18 miles, comprising fifteen townships.[2]

By further treaty made on May 12, 1854 (10 U.S. Stat. at L. 1064), the United States ceded to the Menominees a tract 24 by 18 miles on the Wolf river, consisting of twelve townships, "to be held as Indian Lands are held."[3] This 1854 treaty stated that its articles were "supplementary and amendatory" to the 1848 treaty. By the 1854 treaty the Menominees ceded back to the United States all lands west of the Mississippi. In 1856 the Menominees sold to the Stockbridge Indians two of their twelve townships. The remaining ten townships thus constituted the Menominee Indian Reservation. This reservation continued in existence until the "Termination Act" (68 U.S. Stat. at L. 250, as amended, 70 U.S. Stat. at L. 549, 72 U.S. Stat. at L. 290, 74 U.S. Stat. at L. 867;

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[2] These facts are set forth in Menominee Tribe of Indians (1942), 95 Ct. of Cl. 232.

[3] This tract, less the two townships later sold to the Stockbridge Tribe, is shown on the Map designated as "Wisconsin 2" of Royce, Indian Land Cessions, referred to in footnote 1, and is designated on the map by the numeral 322.

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25 U.S.C. secs. 891-902), passed originally by congress in 1954, became effective by the Secretary of Interior's proclamation of April 29, 1961 (26 Fed. Reg., No. 82, April 29, 1961, at page 3726). This proclamation proclaimed the transfer (pursuant to sec. 899 of the Termination Act) of all tribal property held in trust by the United States government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961. Title to the lands comprising the former Menominee Indian Reservation is now held by Menominee Enterprise, Inc., a Wisconsin corporation incorporated on January 23, 1961. The capital stock of this corporation is held in a voting trust for the benefit of the members of the Menominee Indian Tribe. The acts committed by defendants which led to the instant criminal prosecutions occurred on these lands.

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In view of the foregoing history we are faced with the preliminary question of whether, at the time the Termination Act became effective, the Menominees had exclusive hunting rights free from the state's game laws which arose either by reservation under the 1848 treaty (as modified by the 1854 treaty), or by cession under the 1854 treaty.

This court in *State* v. *Johnson* (1933), 212 Wis. 301, 249 N. W. 285, citing *United States* v. *Winans* (1905), 198 U.S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, held that where Indians cede part of their lands by treaty and retain other lands, for their own use, as to which no government patents have ever been issued, their rights to fish and hunt on their retained lands, without being subject to the state's fish and game laws, continue even though

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the treaty contains no express reservation to that effect. We do not consider, however, that this principle has any application to the instant cases for two reasons. First, on the record before us, we cannot determine whether the lands where the alleged offenses were committed were part of the lands then owned by the Menominees at the time of the 1848 treaty. Only part of the former Menominee Indian reservation was included in the tract
154 ceded to the United States by that treaty. The other part of the reservation consisted of lands which the Chippewa Indians had ceded to the United States by treaty made October 4, 1842.[4] Secondly, the 1848 treaty ceded all Menominee lands in Wisconsin to the United States, and the 1854 treaty did not abrogate this cession, but made an entirely new cession of the twelve townships to the Menominees. This is so even though the 1854 treaty stated that it was "supplementary and amendatory" to the 1848 treaty.

Therefore, if the Menominees, prior to the effective date of the Termination Act, had exclusive hunting rights over the lands embraced in their reservation free from the state's game laws, such rights must be grounded on the 1854 treaty provision whereby such lands were ceded to them "*to be held as Indian Lands are held.*" On the face of it this is an ambiguous provision. One permissible interpretation would be that the Menominees would enjoy the same rights with respect to the ceded lands as Indians are entitled to with respect to

[4] This is apparent by comparing Maps "Wisconsin 1" and "Wisconsin 2" of Royce referred to in footnotes 1 and 3, and by referring to pages 776-777 of the text. The lands ceded by the Chippewas in 1842 is represented on Map "Wisconsin 1" by the tract bearing the numeral 261.

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lands owned and occupied by them which have never been ceded by treaty. Among such rights would be that of hunting free from the restrictions of any state game laws. The rule of construction to be followed in interpreting Indian treaties is that in case of ambiguity they are to be interpreted in favor of the Indians. This was the holding in *Winters* v. *United States* (1908), 207 U. S. 564, 576-577, 28 Sup. Ct. 207, 52 L. Ed. 340, wherein the court declared:

155 "By a rule in interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."

It would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them "to be held as Indian Lands are held." Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty.

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This brings us to the crucial question of whether these exclusive rights to hunt free of the state's game laws were ended by the taking effect of the Termination Act. Congress has plenary power to deal with the Indians and may abrogate by statute Indian privileges and rights, including treaty rights. This principle was clearly enunciated in *Lone Wolf* v. *Hitchcock* (1903), 187 U.S. 553, 565-566, 23 Sup. Ct. 216, 47 L. Ed. 299, wherein the court stated:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 531, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay* 169 U. S. 264, 270; *Ward* v. *Race Horse*, 163 U. S. 504; 511; *Spalding* v. *Chandler*, 160 U. S. 394. 405; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616."

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For a recent federal case which acknowledges the existence of this plenary power of Congress over Indian tribes which cannot be limited by treaties, see *Anderson* v. *Gladden* (9th Cir. 1961), 293 Fed. (2d) 463, affirmed by memorandum decision, 368 U. S. 949, 82 Sup. Ct. 390, 7 L. Ed. (2d) 344 (1961).

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Sec. 891 of the Termination Act provides that the purpose "is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." Sec. 899 of the Act provides that upon the Secretary of the Interior publishing a proclamation in the Federal Register that all tribal property has been transferred in accordance with the Act, "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and *the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

The italicized statutory language, given its plain and ordinary meaning, would subject the Menominees' pre-existing exclusive hunting rights to the state's game laws. However, defendants' counsel contends that the legislative history surrounding the enactment of the Termination Act precludes such an interpretation because it shows that this was not the intent of Congress.

The original bill, which was finally enacted by the 83rd Congress in 1954 as the Termination Act, originated in the House of Representatives as H. R. 2828. Two other companion bills to provide for the withdrawal of the Menominee Tribe from federal jurisdiction were also introduced, the one in the Senate being S. 2813, and the one in the House of Representatives being H. R. 7135. Joint hearings on all three bills were held before Subcommittee of the Committee on Interior and Insular Affairs of the Senate and the Subcommittee of the Committee on Interior and Insular Affairs of the

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157 House of Representatives on March 10th, 11th, and 12th, 1954. Both S. 2813 and H. R. 7135 contained express provisions which preserved any special hunting and fishing rights the Menominees might have by treaty, statute, custom or judicial decision. H. R. 2828 contained no such corresponding provision. At pages 587-589, the printed report of the proceedings of this joint hearing[5] contains a letter dated March 5, 1954, addressed to the chairman of the House Committee on Interior and Insular Affairs by Orme Lewis, Assistant Secretary of the Interior, which explains the differences between the three bills, and mentions the difference in the treatment of hunting and fishing rights noted above. With respect to H. R. 2828 the letter states (p. 588):

> "H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have. If any special hunting and fishing rights have been granted by statute, however, they will be repealed by the provision of the bill making inapplicable all statutes that apply to Indians merely because of their status as Indians."

H. Rex Sigler of the Solicitor's Office, Department of Interior, gave this testimony at the joint hearing (at page 62):

> "The next difference relates to hunting and fishing rights. The earlier bill [H. R. 2828] does not say anything at all about the subject. It is silent. And by its silence it, in my judgment,

[5] "Joint Hearings Before the Subcommittee of the Committees on Interior and Insular Affairs, Congress of the United States, Eighty-Third Congress, Second Session on S. 2813, H. R. 2828 and H. R. 7135."

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makes no change in any treaty rights that may exist. However, the earlier bill will repeal any hunting and fishing rights that may have been granted by statute. I do not know of any such rights, but there is the general provision in the bill making inapplicable to these Indians Federal legislation that applies to Indians as such, which would affect any special statute that may be on the books. Again, I do not know of any such statute. It would not, however, in my judgment, affect the treaty rights, which are not specifically mentioned but are not in conflict with this particular bill.

"The later bill, however, would specifically preserve all hunting and fishing rights granted not only by treaty but also by statute or custom
158 or judicial decision. And to that extent, the bill would qualify the authority of the State to apply its conservation laws. So the issue, as I see it, is whether the Federal Government should specifically provide that hunting and fishing rights beyond treaty rights should be immune from State regulation."

Both the Lewis letter and the Sigler statement are favorable to the defendants' position. This is because both take the position that H. R. 2828 would not affect fishing and hunting rights conferred by treaty while it would affect those conferred by statute. Neither, however, specifically mentions the provision of the bill now found in sec. 899 of the Termination Act that "*the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*" (Italics supplied.)

At the joint hearing Glen A. Wilkinson, attorney for the Menominee Tribe, submitted a written

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statement which is printed in full in the report of this hearing. In this written statement Wilkinson commented on that part of the Lewis letter, or report, of March 5, 1954, quoted above (at page 697):

> ". . . the statement is made that 'H. R. 2828 contains no provision on this subject. It does not purport to affect any treaty rights the Indians may have.' Whether it 'purports' to affect such treaty rights seems immaterial; the fact is that it does, at least by implication, abolish the tribal rights to exclusive hunting and fishing privileges within the reservation—rights which were solemnly assured to the tribe in perpetuity."

Thus two conflicting interpretations of the effect of H. R. 2828 on the Menominees' fishing and hunting rights were presented at the joint hearing. Counsel for the defendants contends that the tribal representatives agreed to the interpretation of Lewis and Sigler. Wilkinson's statement seems to refute this. We are unable to find any proof that Congress in enacting H. R. 2828, without any express reference to hunting and fishing rights, intended to agree with the interpretation of Lewis and Sigler. An equally tenable inference is that
159 Congress, in enacting the Termination Act which ended the status of the Menominees as wards of the United States, intended that whatever exclusive hunting and fishing rights the Indians possessed on their tribal lands should be subject to the same state conservation laws as are the hunting and fishing rights of any other landowners.

In considering the instant problem of interpretation we consider pertinent the preamble of House Concurrent Resolution 108, 83rd Congress, 1st

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Session, pursuant to which resolution H. R. 2828 was drafted and introduced:

> "Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> "Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:" [6]

It is our conclusion that the express provision of sec. 899 of the Termination Act that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," includes the state conservation laws applicable to hunting. To this extent the Termination Act abrogates any right to be free of the state's game laws in exercising hunting rights over the former tribal lands of the reservation. Whether the Menominees by reason of treaty still enjoy any special hunting rights over their former reservation lands, other than that of being free of such game laws, which were not abrogated by the Termination Act, we do not here decide.

By the Court.—Judgments reversed and causes remanded for further proceedings not inconsistent with this opinion.

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[6] This resolution is set forth in full at page III of the report of the joint hearing referred to in footnote 5.

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DIETERICH, J. (dissenting). I cannot agree with the majority decision that the Termination Act abrogates the rights of the Menominee Indians to exercise their hunting and fishing rights free from the state's game laws. The majority concedes that under the 1848 and 1854 treaties the hunting and fishing rights of the Menominee Indians were held free from state game law restrictions. The Termination Act of 1961, contains no reference to the subject, and does not purport to affect any treaty rights the Indians may have. The Termination Act is based on the assumption that during the years of government supervision of Indian affairs, the government has so advanced and prepared the Indians for modern living, that they have become self-sufficient. The amount of fiscal aid provided the Menominees in the short period since the enactment of the Termination Act is by itself sufficient to show the unsoundness of this assertion. While hunting and fishing is not in itself a sufficient supplement to the modern way

161 of life, it does help. The rights of the Menominee Indian to hunt and fish on tribal lands far outweighs any need of the state of Wisconsin or any of its agencies to invade these rights. This is especially so in that these rights were reserved to the Menominees under the treaties of 1848 and 1854.

An examination of the record discloses that the deed of forest lands from the United States to Menominee Enterprises, Inc., dated April 26, 1961, contains a provision prohibiting transfer of ownership of the lands for a period of thirty years without prior consent of the state conservation commis-

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sion and approval of the Governor. The conveyances from Menomniee Enterprises to the individual Menominee Indian landholders give Menominee Enterprises an option to repurchase the lands in the event that the grantees decide to sell. In other words, Menominee Enterprises exercises complete control over the lands. It should also be noted that the Termination Act provides a way of life for the Indians by a provision that the timberland be operated on a sustained yield basis. Their other way of life, namely by hunting and fishing, is not referred to at all. The conveyances give Menominee Enterprises complete control over transfer of the lands, and the sustained yield provisions of the Termination Act control the use of the lands. How, then, can this court say that the Indians have been given the same rights as other citizens of Wisconsin, when control over any transfer of their lands is to be held in trust for a period of thirty years, and when the use to which the Menominees may put these lands is closely regulated by the provisions of the Termination Act, and the Menominee Indians Assistant Trust. In effect, the Menominee Indians have not received full status as citizens, and under the facts of the instant case, retain their inherent tribal hunting and fishing rights, which were assured to them in perpetuity under the terms of the treaties of 1848 and 1854. I would affirm the judgment of the trial court.

APPENDIX C

TREATY OF MAY 12, 1854 (10 Stat. 1064)

Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menominee tribe of Indians, by the chiefs, headmen, and warriors of said tribe—such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menominees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guaranteed not to contain less than six hundred thousand acres; . . .

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable and stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by

the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menominee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being township 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

* * * * *

In testimony whereof, the said Francis Huebschmann, superintendent as aforesaid, and the chiefs, headmen, and warriors of the said Menominee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

Francis Huebschmann, [L. S.]
Superintendent of Indian affairs.

APPENDIX D

MENOMINEE TERMINATION ACT OF 1954, AS AMENDED (25 U.S.C. §§ 891-902)

§ 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

* * * * *

§ 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: . . . When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe.

* * * * *

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. . . . The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. . . .

§ 897. Transfer of property

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. . . .

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. . . .

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS WASHINGTON 25, D.C.

July 2, 1956

Memorandum

To: Area Director: Aberdeen, Gallup, Phoenix, Billings, Minneapolis, Portland

From: Commissioner, Bureau of Indian Affairs

Subject: Policy of the Bureau respecting the protection and preservation of Indian hunting and fishing rights in termination legislation.

The purpose of this memorandum is to set forth the policy of the Bureau of Indian Affairs concerning the protection and preservation of Indian hunting and fishing rights in planning and executing readjustment or termination programs.

Following the policy laid down by the Congress in the enactment of the act of August 15, 1953 (67 Stat. 588; Public Law 280, 83d Cong.), the Bureau's policy will be to protect and preserve any right, privilege or immunity with respect to hunting, trapping or fishing afforded to any Indian or Indian group by Federal treaty, agreement or statute in the planning and execution of readjustment programs, including the seeking of legislation necessary to carry out such programs.

Section 2 of the act of August 15, 1953, *supra*, states the policy of the Congress concerning the protection and preservation of Indian hunting and fishing rights. It provides that nothing in the act shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement or statute with respect to hunting, trapping or

fishing or the control, licensing or regulation thereof. The Department of Interior adopted the view that the rights, privileges or immunities referred to were those expressly reserved in treaties or agreements, and those expressly granted in Federal statutes. However, in a recent case entitled *Klamath and Modoc Tribes, et al., v. Maison*, as yet unreported, the Federal District Court for the District of Oregon held that even though hunting was not specifically mentioned in the treaty of October 14, 1864 (16 Stat. 707), hunting rights were an implied part of that treaty. The court held that the Indians were afforded an exclusive right to hunt and trap on the reservation, without restriction and control except such as they may impose upon themselves, and that the act of August 15, 1953, *supra*, did not extend the State hunting and trapping laws to the reservation.

It thus appears, from the only judicial interpretation of the act which has been made, that the intention of Congress was to preserve and protect both express and implied rights, privileges and immunities afforded under Federal treaties, agreements, or statutes with respects to hunting, trapping and fishing. This Bureau will accept the interpretation of the statute as made by the courts and lend such assistance as is possible in preserving and protecting hunting and fishing rights of the Indians. Of course, if the courts in the future interpret the statute differently than in the case mentioned above, the Bureau necessarily will have to accept and be guided by such interpretation. It should be borne in mind that the judicial interpretation of the statute dealt with herein relates only to rights which flow from treaties or agreements between Indian tribes and the United States, and from statutes enacted by the Congress. In the absence of such treaties, agreements or statutes, there appear to be no rights which would be preserved by Public Law 280.

You should continue your efforts, in full consultation with the Indian tribes, in seeking assumption of civil and

criminal jurisdiction by the States under the act of August 15, 1953, *supra*, particularly in those cases where a termination or readjustment program is being planned. Assumption of jurisdiction by the State under that act will resolve the matter of protecting and preserving hunting and fishing rights so that it will not be an issue in your discussions with Indian groups on readjustment plans, and perhaps more importantly, such assumption of jurisdiction will make easier the execution of other phases of the readjustment program.

In informal discussions, both here and in the field, respecting hunting and fishing rights as they are related to readjustment or termination programs, the possibility has been mentioned of obtaining a surrender or relinquishment of such rights from Indian tribes or members in consideration of a cash settlement. The policy of this Bureau is that we will not, as a general rule, recommend that the Indian people be paid for relinquishment of hunting and fishing rights, and Area Directors should discourage any effort aimed in this direction.

Please transmit to each tribal council in your area the information contained in the first five paragraphs hereof.

/s/ Glenn F. Emmons
Commissioner

CC: For information—Area Directors: Anadarko
Juneau
Muskogee
Sacramento

APPENDIX F

IN THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF KLAMATH

No. 61-792 C

THE STATE OF OREGON,
Plaintiff,

vs.

HARRY PEARSON,
Defendant.

MEMORANDUM OPINION AND ORDER

There was, on the 22nd day of November, 1961, a complaint filed wherein The State of Oregon was Plaintiff vs. Harry Pearson, a member of the Klamath Tribe of Indians, Defendant. The State alleged in their complaint that Harry Pearson, a member of the Klamath Indian tribe, is accused of the crime of illegal possession of deer meat in that he wilfully and unlawfully, in the County of Klamath, State of Oregon, within the area formerly known as the Klamath Indian Reservation, have in his possession a certain deer carcass * * *, said defendant not then and there having secured and having in his possession a deer tag.

This was demurred to on the grounds that the complaint does not state facts sufficient to constitute a crime and that this Court does not have jurisdiction over the offense and crime as alleged in the complaint. In support of this demurrer, the defendant through counsel O'Neill & McLaren, filed briefs to which the State of Oregon answered by brief. The question was whether the individual Indians who were members of the Klamath and Modoc tribes and Yahooskin Band of Snake Indians,

hereinafter referred to as the Klamath Indians, retain the right to hunt subsequent to the Klamath Termination Act as amended. (Title 25 U.S.C.A. 564)

OPINION

In aboriginal times up to the coming of the white man and through the period of recorded history, the Indians known as Klamath and Modoc Tribes and the Yahooskin Band of Snakes, as individuals possessed, according to their culture, a large portion of the states of Oregon and California and the right to hunt without restriction or control except that imposed by themselves was included in such possessions, according to their culture. The right to hunt was a substantial portion of their subsistance, and inured to succeeding generations up to and including the period following the treaty of 1864 and was practiced by members of the reservation up to the present time.

To understand the rights of the Klamath Indians with regard to hunting, it is necessary to examine briefly the legislative history of various treaties and acts affecting them. Federal District Judge Gus Solomon decided in the case of Klamath & Modoc Tribes and Yahooskin Band of Snake Indians of the Klamath Reservation in The State of Oregon, et al., Plaintiffs, vs. H. G. Maison, Superintendent of the Department of State Police, State of Oregon, et al, [139 F. Supp. 634 (D. Ore. 1956)] that the members of said tribes "have a right, privilege or imminity pursuant to federal treaty, agreement or statute, and specifically pursuant to the Treaty with the United States of America of October 14, 1864, 16 Stat. 707, to hunt and trap upon the Klamath Indian Reservation without restrictions or control by the State of Oregon; and that Public Law 280, 83rd Congress Act of August 15, 1953, 67 Stat. 588, 18 U.S.C.; Title 1162, 28 U.S.C.; Title 1360,

did not extend the hunting or trapping laws of the State of Oregon to the Klamath Reservation."

The significance of this decision, in the opinion of the Court, inasmuch as the treaty of 1864 did not mention hunting or trapping, is that the Indians possessed the right in the absence of a grant away and the Court so held in the above-mentioned case.

The subcommittee of the House saw fit to amend Public Law 280 in the portion of the amended bill dealing with criminal jurisdiction, sec. 2, subsection b, and recognized specifically the right of any Indian, with regard to Public Law 280, to hunt and trap.

The Supreme Court of the State of Wisconsin in a case involving the Chippewas cited as State vs. Johnson, 212 Wis. 301; 249 N. W. 285, held as follows:

> "While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they theretofore enjoyed we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them at the time the treaty of 1854 was entered into and was not a shadow of impediment upon the hunting rights of the Indians on the lands retained by them. *The treaty was not a grant of rights to the Indians but a grant of rights from them*, a reservation of those not granted. (U.S. vs. Winans 198 U.S. 371, 25 S. Ct. 662, 664; 49 L.Ed. 1089) We entertained no doubt the right of Indians to hunt and fish upon their lands continued." (emphasis added)

The case of United States vs. Winans and the above-mentioned case both sustained the theory which this Court adopts that right or duties imposed on the Indians herein were not grants to them but from them to the government: therefore, what they have not granted away they still possess and any substantial right or possession, such as hunting, cannot be taken away by implication.

Since the Klamath Termination Act as amended did not specifically provide for a grant away of the hunting and trapping rights with due and proper consideration therefor, it is the conclusion of this Court that they are still retained by the enrolled members only and they can exercise their heritage to hunt and trap within the areas of the former existing Klamath reservation without restriction by the State of Oregon. This Court does not decide any question with relation to privately held lands within the former reservation area as that question is not now before this Court.

ORDER

It is the order of this Court that the demurrer filed by the defendant, Harry Pearson, be sustained;

That the enrolled members only of the Klamath Tribe of Indians shall have a right to hunt and trap within the areas in the formerly existing Klamath reservation without restriction by the State of Oregon.

Dated this 30th day of November, 1961, at Klamath Falls, Oregon.

/s/ Hal F. Coe
District Judge

APPENDIX G

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 8081

KLAMATH & MODOC TRIBES [ET AL.],
Plaintiffs,

v.

H. G. MAISON [ET AL.],
Defendants

and

UNITED STATES OF AMERICA,
Intervenor

FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

CONCLUSIONS OF LAW

1. The Court has retained jurisdiction over this case pursuant to its previous judgment entered March 13, 1956, and the Court has jurisdiction to consider the petition for relief pursuant to 28 U.S.C. § 2202. The Court specifically determines that the provisions of § 2281 of Title 28, U.S.C., requiring a three-judge court are not applicable.

2. The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians continue to constitute a Tribe whose membership is composed of remaining members whose names appear on the official roll of remaining members of the Klamath Tribe, as certified under date of March 3, 1959.

3. Said Tribe continues to hold the beneficial and equitable interest in certain real property, more specifically described in the Court's judgment herein, title to which was conveyed by the United States of America, Department of the Interior, on March 3, 1959, and on May 6, 1959, by deeds to tribal property to The United States National Bank of Portland, Trustee in trust for said Tribe as defined in paragraph 2 above.

4. With respect to the lands mentioned in paragraph 3 above, the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians and the remaining enrolled members thereof have an exclusive right, privilege and immunity afforded them under the Treaty of October 14, 1864 (16 Stat. 707), between said Tribe and the United States of America, to hunt and trap upon said lands without restriction or control, except such restriction or control as they may impose upon themselves.

5. With respect to those members of the said Tribe who elected to withdraw from the Tribe, to the extent that those members may not have received "the money value of their interests in tribal property," and therefore continue to be members of the Tribe for purposes of tribal claims against the United States (see 25 U.S.C.A. 564e(c) and 564t) such withdrawn members have no rights, privileges or immunities to hunt and trap upon the lands referred to in paragraph 3 above.

6. The lands comprising the remainder of the original Klamath Reservation which were purchased, sold, taken or disposed of by the United States and which, in part, later became a part of the Winema National Forest under the proclamation of the President of the United States (No. 3423, July 29, 1961, 26 F. R. 6799), and which, in part, became the Klamath Forest National Wildlife Refuge, are free and unburdened by any right of the Tribe or its remaining or withdrawing members to hunt and trap thereon pursuant to the Treaty of October 14, 1864 (16 Stat. 707) and said lands are sub-

ject to the control and regulation by defendants with respect to hunting and trapping laws of the State of Oregon.

7. It is not necessary at this time that the Court grant any injunctive relief but jurisdiction is reserved to grant such relief in an appropriate proceeding upon application by plaintiff Tribe and upon a proper showing of the necessity thereof.

Done and dated at Portland, Oregon, this 10th day of December, 1963.

/s/ Gus J. Solomon
United States District Judge

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148 And afterwards to-wit on the 1st day of November, A.D., 1963, the same being the 37th day of said term, the following proceedings were had in words and figures following, that is to say:

State of Wisconsin,
Plaintiff in Error

v.

Joseph L. Sanapaw and
William J. Grignon,
Defendants in Error,

State of Wisconsin,
Plaintiff in Error,

v.

Francis Basina,
Defendant in Error

These causes come on to be heard on writs of error from the judgments of the County Court of Menominee County and were argued by Counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgments of the County Court of Menominee County, reviewed in these causes, be, and the same are hereby, reversed.

And that these causes be, and the same are hereby, remanded to the said County Court for further proceedings not inconsistent with the opinion.

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In The

Supreme Court of the United States

October Term, 1963

No. 930

JOSEPH L. SANAPAW, WILLIAM J. GRIGNON, and FRANCIS BASINA,

Petitioners,

v.

STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

GEORGE THOMPSON
Attorney General

HAROLD H. PERSONS
Assistant Attorney General

JOHN H. BOWERS
Special Counsel

Attorneys for Respondent, State of Wisconsin

State Capitol
Madison, Wisconsin

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Upon termination of federal supervision and control over the Menominee Indian Tribe by Public Law 399, 83rd Congress, the enrolled members of the Menominee Indian Tribe and the lands in Menominee County, comprised of what was formerly the Menominee Indian Reservation, became subject to Wisconsin laws with respect to hunting, and the application of state hunting laws to such persons and lands presents no substantial federal question 7

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MENOMINEE TERMINATION ACT

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In The

Supreme Court of the United States

October Term, 1963

No. 930

JOSEPH L. SANAPAW, WILLIAM J. GRIGNON, and FRANCIS BASINA,

Petitioners,

v.

STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Wisconsin is reported in 21 Wis. (2d) 377, 124 N. W. (2d) 41.

II. JURISDICTION.

Respondent opposes the petition for writ of certiorari on the ground that these cases[1] do not present any substantial federal question in connection with the applica-

[1]Two judgments are involved. By agreement of the parties in the Wisconsin Supreme Court the two writs of error were submitted together.

tion of Wisconsin hunting laws to enrolled members of the Menominee Indian Tribe and to the area which was formerly the Menominee Indian Reservation (now Menominee County) following termination of federal supervision and control over the Menominee Indian Tribe by Public Law 399, 83rd Congress, as amended.

III. QUESTION PRESENTED FOR REVIEW.

We respectfully submit the following revision of the question stated in petitioners' petition at page 2:

Upon termination of federal supervision and control over the Menominee Indian Tribe by Public Law 399, 83rd Congress, as amended, did the enrolled members of the Menominee Indian Tribe and the lands in Menominee County, comprised of what was formerly the Menominee Indian Reservation, become subject to Wisconsin laws with respect to hunting in the same manner and to the same extent as other persons and lands within the state?

IV. STATEMENT OF THE CASE.

The defendants Joseph L. Sanapaw, William J. Grignon, and Francis Basina were each charged with hunting deer with the aid of an artificial light, in violation of Wis. Adm. Code, Sec. WCD 10.10 (2), and with the transportation of a loaded and uncased gun in an automobile in violation of Wis. Adm. Code, Sec. WCD 10.07 (3), in the Town of Menominee, in Menominee County, on the 8th and 9th days of September, 1962 (R. 131-132; 140-141).[2] Each of the defendants is an enrolled member of the Menominee Indian Tribe of Wisconsin (R. 133-134). The trial court found that each of the defendants did in fact commit the acts charged in the complaint and warrant, but the court further found that by reason of their enrollment as members of the Menominee Indian Tribe the defendants were not subject to the State's conservation laws and that the applicable statutes and conservation commission orders under which the prosecutions were brought do not apply to the defendants by reason of their enrollment as members of the Menominee Indian Tribe (R. 121-122; 137-138). The state prosecuted writs of error to the Wisconsin Supreme Court pursuant to section 958.12 (1) (d), Wis. Stats., to review the judgments upon the question of law involved. By agreement of the parties, two writs of error were submitted together because the cases presented a common question of law.[3] The Supreme Court of Wisconsin reversed the judgment of the trial court and held that the "Termination Act" abrogated any right to be free of the

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[2]The page references are to the pages of the appendix which was filed in the Wisconsin Supreme Court.

[3]**State v. Sanapaw** (1963), 21 Wis. (2d) 371, 379, 124 N. W. (2d) 41.

state's game laws in exercising hunting rights over the former tribal lands of the reservation.

By the Treaty of October 18, 1848 (9 Stat. 952) between the Menominee Indians and the United States, the Menominees ceded all of their lands in the State of Wisconsin to the United States. The Treaty provided for a grant of lands to the Menominee Indians from the United States for a home west of the Mississippi, and provided that the Menominee Indians would be permitted to remain on the ceded lands in Wisconsin for an ensuing period of three years from the date of the Treaty and until the President notified the Indians that the lands were wanted. The tribe did not remove from Wisconsin and by the Treaty of May 12, 1854 (10 Stat. 1064) the United States ceded a tract of land to the Menominees for a permanent home, and this tract became the Menominee Indian Reservation.

Prior to May 1, 1961, the Menominee Indian Tribe and the Menominee Indian Reservation were, with certain exceptions not material here, subject to federal supervision and control. Title to the Menominee Indian Reservation was held in trust for the tribe by the United States Government. Civil and criminal jurisdiction over the Menominee Indian Reservation was surrendered by the United States Government in favor of the State of Wisconsin in 1954, by Public Law 280, 83rd Congress, as amended (67 Stat. 588, as amended 68 Stat. 795; 18 U. S. C. sec. 1162; 28 U. S. C. sec. 1360). Public Law 280 specifically retained, in favor of the Indians, all hunting and fishing privileges enjoyed by the Indians by reason of federal treaty or statute.

In 1954 Congress provided for the termination of all federal supervision and control over the Menominee Indian

Tribe and the Menominee Indian Reservation by Public Law 399, 83rd Congress, popularly known as the "Termination Act" (68 Stat. 250, as amended, 70 Stat. 544, 70 Stat. 549, 72 Stat. 290, 74 Stat. 867; 25 U. S. C. secs. 891-902). On April 29, 1961, the Secretary of the Interior proclaimed the transfer, pursuant to sec. 8 of the Termination Act, of all tribal property held in trust by the United States Government, and the termination of all federal supervision and control over the Menominee Indians and the Menominee Indian Reservation effective midnight April 30, 1961 (26 Fed. Reg., No. 82, April 29, 1961, page 3726). Upon publication of the "Plan For The Future Control Of Menominee Indian Tribal Property And Future Service Functions" (hereinafter the Plan) in the Federal Register in connection with the proclamation of termination by the Secretary of the Interior, Ch. 259, Wis. Laws 1959, became effective, and what was formerly the Menominee Indian Reservation became Wisconsin's 72nd county (Wis. Laws 1959, Ch. 259, sec. 42).

V. ARGUMENT

UPON TERMINATION OF FEDERAL SUPERVISION AND CONTROL OVER THE MENOMINEE INDIAN TRIBE BY PUBLIC LAW 399, 83rd CONGRESS, THE ENROLLED MEMBERS OF THE MENOMINEE INDIAN TRIBE AND THE LANDS IN MENOMINEE COUNTY, COMPRISED OF WHAT WAS FORMERLY THE MENOMINEE INDIAN RESERVATION, BECAME SUBJECT TO WISCONSIN LAWS WITH RESPECT TO HUNTING, AND THE APPLICATION OF STATE HUNTING LAWS TO SUCH PERSONS AND LANDS PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

A. *Reasons stated for granting the writ inadequate.*

In support of their petition for the writ, petitioners contend that this case is important not only to the Menominees but to other Indian tribes as well, that since other tribes may be terminated in the future the question will be important to them, that the question is already under litigation in other states, and that the matter has already been productive of much dispute and emotion in other states and needs to be settled (Petition, pages 11-13). The inference is that a decision in this case will settle the matter for other states and tribes. We respectfully submit that it will not. The rights and privileges of other tribes in other states under termination must be decided upon the basis of the particular facts, treaties and statutes involved, and will not be determined or controlled by decision in this case. The treaties between the several Indian tribes in the United States vary in their terms, termination acts vary in their terms, and the jurisdiction of the several

states may vary depending upon the particular territorial ordinance, enabling act and state constitution involved. See, for example, *Tulee v. Washington* (1942), 315 U. S. 681; Klamath Termination Act, 68 Stat. 718, 722; 25 U. S. C. sec. 564m).

B. *Congress has plenary power to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute.*

The extent to which tribal Indians should be emancipated from their status as wards of the Federal Government is a matter which rests entirely within the discretion of Congress. *Lone Wolf v. Hitchcock* (1903), 187 U. S. 553, 565-567; *United States v. Waller* (1917), 243 U. S. 452, 459-460. The power to make treaties with the Indian tribes was abolished in 1871 (16 Stat. 544, 566; 25 U. S. C. sec. 71) and the United States now deals with the Indians by statute. Congress has plenary power to deal with the Indians and may abrogate Indian privileges and rights, including treaty rights, by statute. *Super et al. v. Work* (CCA, D. C., 1925), 3 F. (2d) 90, affirmed per curiam, 271 U. S. 643. The power of Congress over Indian tribes and tribal property cannot be limited by treaty so as to bar repeal or amendment by later statute.

See,

Ward v. Race Horse (1896), 163 U. S. 504;

Lone Wolf v. Hitchcock (1903), 187 U. S. 553, 565-567;

United States v. Waller (1917), 243 U. S. 452;

Anderson v. Gladden (CCA 9th, 1961), 293 F. (2d) 463, Cert. denied 368 U. S. 949;

See, also,

Organized Village of Kake v. Egan (1962), 369 U. S. 60, 72-76.

Even where there is an *express grant* of hunting or fishing privileges to the Indians, such grant is repealed to the extent that it conflicts with the inherent sovereignty of the state to conserve fish and game within its borders and outside of Indian reservations in the exercise of its police power.

Ward v. Race Horse (1895), 163 U. S. 504;

Kennedy v. Becker (1916), 241 U. S. 556;

See also,

Tulee v. Washington (1942), 315 U. S. 681.

While the foregoing establishes the power of Congress to abrogate Indian privileges and rights, including treaty rights, by statute and to terminate the status of Indians and Indian tribes as wards of the Federal Government, it is of interest to note that the Menominee Indian Treaty of February 11, 1856 (11 Stat. 679) expressly provides, in part:

"* * *

"ARTICLE 3. To promote the welfare and the improvement of the said Menomonees, and friendly relations between them and the citizens of the United States, it is further stipulated—

"1. That in case this agreement and the treaties made previously with the Menomonees should prove insufficient, from causes which cannot now been (be) foreseen, to effect the said objects, the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of the affairs of the Menomonees as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary."

C. *The Menominee "Termination Act" specifically provides that following termination all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the Menominee Indians, and that the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.*

The Menominee "Termination Act" (25 U. S. C. secs. 891-902) provides in part:

"[After title to the property of the tribes has been transferred] . . . all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction . . ."

The intent of Congress in passing the "Termination Act" was to terminate federal trusteeship over the Menominee Indians, to abolish the Menominee Indian Reservation, and to make the laws of the several States appli-

cable to the Menominee Indians in the same manner that such laws are applicable to other citizens within the states. This is evident not only from the face of the Termination Act itself, but from *House Concurrent Resolution 108* (67 Stat. B132, 83rd Congress, First Session) which declares as follows in part:

> "Whereas it is the policy of Congress, as rapidly as possible, *to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States,* to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it
>
> "Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: . . . the Menominee Tribe of Wisconsin . . ." (Emphasis added.)

The Termination Act contains no reservation of hunting rights or privileges in favor of the Indians. The Indian reservation has been abolished, (Cf. *Organized Village of Kake v. Egan* (1962), 369 U. S. 60, 74) and the status of

the Menominee Indians and the Menominee Indian Tribe as wards of the Federal Government has been ended.

In 26 Federal Register, No. 82, April 29, 1961, at page 3726 the Secretary of Interior proclaimed the transfer of title to all property real and personal held in trust by the United States for the Menominee Indian Tribe, as follows:

> "Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Public Law 83-399; 68 Stat. 250), it is hereby proclaimed that the title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred in accordance with section 8 of the Act of June 17, 1954, *supra*, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.
>
> "As required by section 7 of the Act of June 17, 1954, *supra*, the Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions is published and appears immediately below this notice."

Thus, the United States has divested itself of all right, title and interest to the lands which comprise what was formerly the Menominee Indian Reservation, and has ended its trusteeship over the lands. What was formerly the

reservation is now Wisconsin's 72nd county, governed by a Wisconsin County Board and a Town Board (Wis. Laws, 1959, Ch. 259). Enrolled members of the Tribe are or may become residents of the town and county and elect town and county officers (Wis. Laws, 1959, ch. 259). Accordingly, Wisconsin has jurisdiction to enforce its conservation laws in the area, and over the members of what was formerly the Menominee Indian Tribe, without exception.

See,

Ward v. Race Horse (1896), 163 U. S. 504;

Kennedy v. Becker (1916), 241 U. S. 556;

Anderson v. Gladden (C. C. A. 9th 1961), 293 F. (2d) 463, cert. den., 368 U. S. 949.

This is not a case like *Seymour v. United States* (1961), 368 U. S. 351. In that case this Court held that the state of Washington had no jurisdiction over a crime committed by an Indian on land within an Indian reservation, although such land had been patented in fee to a white man, and was included within the limits of a town, since such land was within "Indian country" as defined by Title 18 of the United States Code (18 U. S. C., sec. 1151). In the *Seymour* case, the status of the Indian in question as a ward of the United States Government, and the status of the place where the offense was committed as an Indian reservation, had not been terminated as in the present case.

Title to the land is held by Menominee Enterprises, Inc., a Wisconsin corporation. This is more than a mere technical change in form of ownership as suggested by petitioners (Petition, page 6, note 11).

For example, the corporation is authorized to lease non-forest lands and to sell to enrolled members of the tribe, or their heirs at law, individual parcels of non-forest lands for homesites and other development. Such sales may not exceed 14,500 acres in the aggregate (Articles of Incorporation, Menominee Enterprises, Inc., 26 Fed. Reg. No. 82, April 29, 1961, page 3730; Appendix, post p. 23). The capital stock of the company is held in a voting trust for the benefit of the members of the tribe. And, while the initial stockholders are tribal members, the voting trust certificates may be transferred by gift or will to a member's spouse and descendants, and, after January 1, 1966, may be sold, subject to certain conditions (26 Fed. Reg. No. 82, April 29, 1961, pages 3735-3737; Appendix, post p. 22).

Petitioners contend that the requirement in the Termination Act that the tribe's Plan contain provisions for the protection of fish and wildlife suggests exclusive tribal jurisdiction because Congress must have been aware of state regulations and would have concluded that such regulations afforded adequate protection had they thought state law applicable (Petition, page 7). Equally tenable, however, is the inference that Congress intended that state law should apply and that the Plan itself, which was submitted to the Secretary of the Interior for approval, should reflect the adequacy of state law to protect fish and wildlife. This conclusion is supported by the fact that the Termination Act also required that the plan provide for ". . . protection of the forest on a sustained yield basis . . ." (25 U. S. C. 896), and authorized the Secretary of the Interior to accept the tribe's plan provided that he found ". . . that it conforms to applicable Federal and State law" (25 U. S. C. 896). The Plan was approved by the Secretary of the

Interior (26 Fed. Reg. No. 82, April 28, 1961, p. 3726 et seq.). Significantly, the Plan itself provides for the protection of the forest on a sustained yield basis, as required by 25 U. S. C. sec. 896, and state legislation for that specific purpose was enacted (Wis. Laws 1959, ch. 258; see *Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions*, 26 Fed. Reg. No. 82, April 29, 1961, p. 3727 et seq.). The Plan, on the other hand, contained no express provision for the protection of fish and wildlife. It is therefore fair to conclude that a separate provision for protection of fish and wildlife was unnecessary since such protection is provided by the application of Wisconsin's conservation laws to the area and to the members of the tribe.

D. *The treaties between the Menominee Indian Tribe and the United States established no hunting rights or privileges in favor of the Indians within the State of Wisconsin which could continue following termination.*

The Menominee Indian Reservation was created in 1854 out of lands which previously had been ceded by the Menominees to the United States (10 Stat. 1064). The reservation was created by a *grant of lands* to the Indians from the United States, which lands were at the time a part of the public domain and subject to disposal under general law. *Menominee Tribe v. United States* (1941), 95 C. Cls. 232. Accordingly, the Treaty of 1854 (10 Stat. 1064) creating the Menominee Indian Reservation was not a reservation of rights by the Indians, it was a grant to the Indians. The treaty is silent as to the granting of any

hunting privileges or rights in favor of the Indians. Consequently the treaty imposed no servitude on the lands in question in favor of the Indians. Exemption from state conservation law could only be accorded the Menomineés so long as their status as wards of the federal government continued, and while the area remained an Indian reservation. See, *Ward v. Race Horse* (1895), 163 U. S. 504; see, also, *State v. Johnson* (1933), 212 Wis. 301, 309, 249 N. W. 284.

In its opinion the Wisconsin Supreme Court held that the provision in the Treaty of 1854 to the effect that the lands in question would be held as "Indian lands are held" meant that the Indians enjoyed the same exclusive hunting rights free from the restriction of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they had enjoyed over the lands ceded to the United States by the 1848 treaty. The court went on to determine that such rights were terminated by Public Law 399. It is respectfully submitted that the provision in the Treaty of 1854 to the effect that the lands in question would be held as "Indian lands are held" means simply that they are held as the Congress directs.

The fact that the provision whereby the lands in question were "to be held as Indian lands are held" includes exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands prior to termination does not mean that such provision imposed a servitude upon the lands.

Significantly the Act of April 20, 1836 (5 Stat. 10), creating the Territory of Wisconsin, expressly reserved

Indian rights. The Act of August 6, 1846 (9 Stat. 56), to enable the Territory of Wisconsin to become a state and the Act of May 29, 1848 (9 Stat. 233), admitting Wisconsin into the Union are silent as to the reservation of rights in favor of the Indians. Wisconsin was admitted into the Union on equal footing with the original states. Accordingly, the enabling Act of August 6, 1846, and the act admitting Wisconsin into the Union on an equal footing are in patent conflict with any grant, express or implied,[4] of hunting privileges in favor of the Indians which would survive a conveyance of title to the reservation lands to a private corporation, and the dissolution of the reservation and the trusteeship of the United States over the Indians thereby ending their status as wards of the Federal Government. *Ward v. Race Horse* (1895), 163 U. S. 504, 514, 516.

This is not a case like *Tulee v. Washington* (1942), 315 U. S. 681, in which this Court held that where a treaty with the Yakima Indians expressly reserved to members of the tribe certain fishing privileges, and where the state did not deny that the enabling act which admitted Washington as a state preserved the treaty rights of the Indians, the State could not require the Indians to pay a license fee. Significantly, however, this Court did recognize the power of the State to impose purely regulatory restrictions upon the fishing privileges of such Indians outside of their reservations, despite the express reservation of fishing privileges in favor of the Indians contained in the treaties.

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[4]According to **Menominee Tribe v. United States** (1941), 95 C. Cls. 232, 241, part of the inducement for selecting the lands in question for the Menominee Reservation was that they contained swamp lands which were suitable for hunting.

Tulee v. Washington (1942), 315 U. S. 681, 684; See, also, *Maison v. Federated Tribes* (C. C. A. 9th, 1963), 314 F. 2d 169, cert. den. 375 U. S. 829.

In the light of the foregoing, any attempted reservation of hunting rights or privileges in favor of the Indians which would exempt them from the state's conservation laws, following abolition of the reservation, and the termination of the federal trusteeship over the individual Indians, would be of doubtful constitutionality, particularly in view of the fact that Wisconsin was admitted into the Union on an equal footing with the other states and without any reservation of such rights in favor of the Indians. *Ward v. Race Horse* (1895), 163 U. S. 504; *State v. Johnson* (1933), 212 Wis. 301, 309, 249 N. W. 284.

CONCLUSION

It is therefore respectfully submitted that the facts of this case do not present any substantial federal question and that the application for writ of certiorari should be denied.

Respectfully submitted,

GEORGE THOMPSON
Attorney General

HAROLD H. PERSONS
Assistant Attorney General

JOHN H. BOWERS
Special Counsel

Attorneys for Respondent,
State of Wisconsin

APPENDIX

APPENDIX

FEDERAL REGISTER, Volume 26, No. 82, April 28-29, 1961, pages 3726-3755, in part:

* * *

F. R., p. 3726:

DEPARTMENT OF THE INTERIOR
Office of the Secretary

TERMINATION OF FEDERAL SUPERVISION OVER THE PROPERTY OF THE MENOMINEE TRIBE OF WISCONSIN AND OF THE INDIVIDUAL MEMBERS THEREOF

Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Public Law 83-399; 68 Stat. 250), it is hereby proclaimed that the title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred in accordance with section 8 of the Act of June 17, 1954, *supra*, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

As required by section 7 of the Act of June 17, 1954, *supra*, the Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions is published and appears immediately below this notice.

STEWART L. UDALL,
Secretary of the Interior.

April 26, 1961.

[F.R. Doc. 61-4004; Filed, Apr. 28, 1961; 8:55 a.m.]

F. R., p. 3727:

Saturday, April 29, 1961

Bureau of Indian Affairs

PLAN FOR THE FUTURE CONTROL OF MENOMINEE INDIAN TRIBAL PROPERTY AND FUTURE SERVICE FUNCTIONS

The Plan consists of the following documents:

1. Statement of the Plan and Description of its Objectives and Goals (revised December 1, 1960).

2. Articles of Incorporation of Menominee Enterprises, Inc. (revised November 30, 1959).

3. By-Laws of Menominee Enterprises, Inc. (revised November 30, 1959).

4. Menominee Common Stock and Voting Trust (revised November 30, 1959).

5. Menominee Assistance Trust (revised November 30, 1959).

6. Menominee Enterprises, Inc., Bond Indenture (form of bond included) (revised November 30, 1959).

7. Menominee Indian Tribe, Certificate of Beneficial interest.

In addition the following documents are included by reference:

1. Resolution of General Council, Menominee Indian Tribe, January 17, 1959.

2. Resolution of General Council, Menominee Indian Tribe, July 27, 1959.

3. Resolution of Advisory Council, Menominee Indian Tribe, July 28, 1959.

4. Letter of Glen A. Wilkinson, Attorney for Tribe, to Secretary of Interior, July 31, 1959.

5. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, July 31, 1959.

6. Letter from Acting Secretary of Interior to James G. Frechette, Chairman, Menominee Advisory Council, October 30, 1959.

6a. Letter from George W. Abbott, Assistant Secretary of Interior to Jerome Grignon, Chairman, Menominee Advisory Council, January 9, 1961.

7. Copies of Chapters 258, 259, and 260, Laws of Wisconsin, 1959.

* * *

C

F. R., p.3730:

Articles of Incorporation of Menominee Enterprises, Inc.

The undersigned individuals, who are the members of the Coordinating and Negotiating Committee of the Menominee Indian Tribe, for the purpose of forming a Wisconsin corporation under Chapter 180 of the Wisconsin Statutes, do hereby adopt the following Articles of Incoroation:

ARTICLE I—NAME

The name of the corporation is Menominee Enterprises, Inc.

* * *

ARTICLE XII—SALE OF LAND

Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation; provided, however, that the board of directors, or the appropriate officers at the direction of the board of directors, may mortgage or pledge corporation assets, for such borrowing purposes as it shall

deem necessary and advisable, in an amount not exceeding $250,000: and, provided, further, that the board of directors or the appropriate officers at the direction of the board of directors shall have authority to lease real property other than lands designated as forest lands; and, provided, further, that the board of directors, or the appropriate officers at the direction of the board of directors, shall have authority to sell or to convey to individuals, who were enrolled tribal members under section 893, Title 25, U. S. C. (final roll) or their heirs-at-law, individual parcels which in the aggregate will not exceed 14,500 acres for home sites, agricultural use or other development, which lands shall be zoned for that purpose and shall not include lands designated as forest lands.

* * *

F. R., p. 3734:

Menominee Common Stock and Voting Trust

* * *

F. R., p. 3736:

(A) No Beneficiary may transfer any Trust Certificates prior to January 1, 1966, except that transfers may be made by gift or by will or operation of laws of deseent at death, subject to the conditions specified in paragraphs (C) (1) and (2) and (D).

* * *

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1. *Power to Abrogate Treaties.*

Respondent (p. 8) refers to the rule that Congress has plenary power to abrogate Indian treaty rights. This we freely concede. The question is whether Congress actually did so by implication, contrary to a rule almost as old as the Republic, that treaty and statutory language affecting Indians should be construed in their favor, and especially not against them by implication.[1]

---

[1] See, for example, *Worcester* v. *Georgia*, 31 U.S.(6 Pet.) 515, 582 (1832); *The Kansas Indians*, 72 U.S.(5 Wall.) 737, 760 (1866);

2. *The Race Horse Case.*

Respondent (p. 18) states that continued freedom of the hunting rights from state regulation would be of doubtful constitutionality, citing *Ward* v. *Race Horse.*[2]

In the first place, *Race Horse* involved a hunting right exercised on public land 100 miles away from the Indian's reservation,[3] while the instant right was exercised within the Indians' own reservation (or former reservation if one prefers—in any event the land belongs to the Indians, not to the State or anyone else).

In the second place, *Race Horse* involved a hunting right which this Court said the parties intended to be "temporary and precarious."[4] It is inconceivable that the

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Choctaw Nation v. *United States*, 119 U.S. 1, 27-28 (1886). *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380 (1905); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956).

The Internal Revenue Act sweepingly imposes a tax on the net income of "every individual" derived "from any source whatever." Nevertheless, because of the rule of favorable construction where the Indians are concerned, this Court has held that the tax does not apply to income from Indian trust property, despite the absence of any express tax exemption. *Squire* v. *Capoeman*, 351 U.S. 1 (1956).

For cases of this Court applying the rule to Indian fishing rights, see *U.S.* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919). See also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), where this Court upheld exclusive Indian fishing rights in ocean waters surrounding an Indian reservation, though the grant of the reservation had been silent about any such rights in the surrounding waters.

[2] 163 U.S. 504 (1896), reversing 70 Fed. 598 (D. Wyo.).

This was the first case to reach this Court on Indian hunting and fishing rights.

[3] Id. at 506.

[4] Id. at 515. This is a dubious finding, and a state supreme court in a probably indistinguishable case has taken the contrary view. *State* v. *Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347

parties in the instant case ever intended the Menominee hunting right to be "temporary and precarious." The Menominee Indians have owned this right since time immemorial, and the 1854 treaty which confirmed their reservation made no mention of an expiration date or event. The Indians have and still need this right today, and seek to exercise it only on their own land.

In the third place, the underlying attitude against Indian hunting and fishing rights evident in *Race Horse* was later neutralized by the opposite attitude in *United States* v. *Winans*.[5] In the latter case, this Court noted that the treaty was not a grant of rights to the Indians, but a grant of rights *from* them, and a reservation of those (including fishing rights) not granted.[6] And such was the effect of the Menominee treaty of 1848, as amended by the treaty of 1854—the Menominees gave up all they owned outside of the Wolf River reservation, but retained all their rights undiminished within the reservation. If the Yakima fishing rights in *Winans* survived *outside* the Yakima reservation, so should the Menominee hunting rights survive *within* their reservation.[7]

Finally, *Race Horse* has been modified, if it ever meant that the admission of a state ipso facto cancels off-reser-

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U.S. 937. The *Arthur* case, in a closely reasoned and scholarly analysis, concluded that later decisions of this Court had substantially modified *Race Horse*.

[5] 198 U.S. 371 (1905). *Race Horse* involved interference with the rights by state action. *Winans* involved interference by private action. Both involved rights outside the reservation.

[6] 198 U.S. at 381.

[7] *Winans*. upheld the fishing right outside the reservation but within the ceded area. In *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); this Court went even further and upheld the fishing right even outside the ceded area.

vation treaty hunting rights. In *Winans*[8] and *Seufert*[9] this Court rejected that broad interpretation and held that the rights do survive, at least as against *private* interference. In *Tulee*[10] this Court held that the rights survived to the extent of being exempt from state licensing fees, and indicated that the state could only regulate the time and manner of fishing, and only to the extent necessary for conservation.[11] Where the state is unable to clearly prove that particular regulations are actually necessary for conservation, the Indian treaty rights are not subject to them.[12] All of which shows that Indian hunting and fishing rights, even outside the reservation, do carry advantages not enjoyed by non-Indians, as against both state and private interference, and that the constitutionality of these advantages has not been doubtful. *Within* the reservation, at least one which is still supervised by the federal government, state hunting restrictions unquestionably do not apply.[13] Even where the federal government has relinquished its law and order supervision over a reservation pursuant to Public Law 280, state hunting restrictions do not apply to Indian treaty hunting rights.[14]

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[8] *United States* v. *Winans*, 198 U.S. 371 (1905).

[9] *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919).

[10] *Tulee* v. *Washington*, 315 U.S. 681 (1942).

[11] Id. at p. 684.

[12] *Makah Tribe* v. *Schoettler*, 192 F.2d 224 (9th Cir. 1951); *Maison* v. *Confederated Umatilla Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829.

[13] E.g., *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), cert. den. 330 U.S. 827; *State* v. *Sanapaw* below.

[14] See the express saving clause in Public Law 280, 18 U.S.C. § 1162: "Nothing in this section . . . shall deprive any Indian or any Indian tribe . . . of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." Construed in favor of the Indians in *Klamath & Modoc Tribes* v. *Maison*, 139 F.Supp. 634 (D. Ore. 1956).

3. *The Question of Finality.*

At the time this petition was filed, one of the deputy clerks wondered whether the judgment of the Wisconsin Supreme Court was "final," in that none of the petitioners had been sentenced yet. We are familiar with the finality rule, and concede it could be argued that the judgment below will not be final until sentences have been passed (though as we explain below, we believe the sounder view is to hold the judgment final). If this Court holds the judgment non-final petitioners would appear for sentencing (they have already been tried, see below), would obtain a supersedeas or other bond, would take a pro forma appeal to the Wisconsin Supreme Court on the issue already decided against them, and then file a new petition for certiorari in this Court.

We hope, however, that the Court will concede finality in this case, as it has a number of others where the argument against finality is merely technical (the federal and only contested issue having clearly been finally determined) and where the underlying purposes of the finality rule are not offended. We note that the State of Wisconsin, Respondent, has raised no question of finality.

The facts are that the only disputed issue ever in the case, whether as a matter of federal law Wisconsin hunting regulations apply to the Menominee Indians on their reservation, has unquestionably been finally disposed of by the Wisconsin Supreme Court. Nothing further remains for that court. Petitioners have been tried, and the trial court found on the evidence that they would be guilty but for the question of law at bar.[15] Hence nothing remains for the trial court except to pronounce sentence; a single, separate ministerial task which if it gives rise to an appealable issue at all would not give rise to a federal one.[16]

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[15] See colloquy at R. 134-135, and finding at R. 121.

[16] Cf. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 127 (1945): ". . . the accounting which remains to be taken could not remotely give rise to a federal question."

Stern & Gressman[17] say that the philosophy underlying the requirement of finality is the—

> " . . . harmonious relationships of a federal-state character. They [the finality rules] are designed so that the Court can avoid piecemeal interference with state court proceedings and can refrain from asserting its jurisdiction until a controversy in the state court shall have been finally resolved."

Our case satisfies this policy. The state has spoken on the only disputed issue in the case, and will not speak again. Petitioners' guilt has been tried and established. Nothing remains but the ministerial aftermath, the sentencing.

We see no essential difference between the status of our case, and, for example *Radio Station WOW* v. *Johnson*,[18] where this Court held final a judgment of the Nebraska Supreme Court, even though that judgment contemplated further proceedings for an accounting.[19]

In *Clark* v. *Williard*,[20] the trial court held that certain creditors did not have preferred claims against a dissolved corporation. The Montana Supreme Court reversed, holding that these creditors did have preferred claims, and remanded for further proceedings. This Court held the judgment final because the question of the creditors' preference had been finally disposed of, and "nothing was left to the discretion of the trial court in respect of the

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[17] Stern & Gressman; Supreme Court Practice (3d Ed. 1962) at p. 74; generally, see also Robertson & Kirkham, Jurisdiction of the Supreme Court §§ 23-42 (1936).

[18] *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124 (1945).

[19] See also *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848); *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362 (1914).

[20] 292 U.S. 112 (1934).

priority of the execution or of the respondents' rights thereunder." (p. 118)

In *Brown Shoe Co.* v. *United States*,[21] this Court held final a federal antitrust order of divestiture, even though the details of the divestiture order had not yet been determined.

In *Johnson* v. *Muelberger*,[22] this Court held final a judgment of the New York Court of Appeals reversing and remanding for trial a lower court decision that a foreign state divorce decree was not subject to collateral attack.

In *Pope* v. *Atlantic Coast Line R. Co.*,[23] this Court held final a judgment of the Georgia Supreme Court reversing a lower court decision which had upheld a demurrer. In other words, when the case came to this Court, the case had not even been tried. The petitioner-defendant there conceded that the issue decided against him by the Georgia Supreme Court was his only defense, and this Court held the ruling final. Comparably, we make the same concession, i.e. that the issue at bar here is the only controlling one.

Petitioners in a case such as this have little choice but to seek review as they have. If they wait until after sentencing to seek review, they face the possible argument that the earlier judgment of the state supreme court was the final judgment and that the time for review of the key question has expired.[24] As Stern & Gressman advise,[25]

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[21] 370 U.S. 294 (1962).

[22] 340 U.S. 581, 583 (1951).

[23] 345 U.S. 379 (1953).

[24] See *Rio Grande Western R. Co.* v. *Stringham*, 239 U.S. 44 (1915); cf. *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507 (1950).

[25] Stern & Gressman, p. 80.

". . . it is best to seek review of the first judgment whenever its finality is a reasonable possibility . . . ."

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 930

JOSEPH L. SANAPAW, WILLIAM J. GRIGNON, AND FRANCIS BASINA, PETITIONERS

v.

STATE OF WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's request of May 4, 1964, for the views of the United States.

1. The question is whether the Menominee Termination Act, providing that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," impliedly exempted the tribe's hunting and fishing rights from the operation of State conservation laws. The Supreme Court of Wisconsin held that there was no basis for reading such an exemption into the Act. We think that conclusion was correct.

Prior to the Termination Act, the right of the Menominees to hunt and fish on lands within the

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reservation was a normal incident of their ownership (or possession) of those lands. Because of the settled policy of Congress to preserve tribal sovereignty, it is well established that the States are without jurisdiction to regulate the conduct of Indians within a reservation. Cohen, *Federal Indian Law* (1956 ed.) 512–513. It was by virtue of this general doctrine, and not because of any special rights conferred upon them by the Treaty of 1854, that the Menominees enjoyed immunity from State game laws. By ending federal supervision over what had formerly been the Menominee Reservation, and by making State laws fully applicable thereto, the Termination Act placed the Menominees on the same footing as other landowners within the State.

The Court has frequently declared that Indian hunting and fishing rights on lands outside a reservation, even though expressly guaranteed by treaty, are subject nonetheless to regulation (other than the imposition of licensing fees) by the State. *Ward* v. *Race Horse,* 163 U.S. 504; *Tulee* v. *Washington,* 315 U.S. 681, 684 (dictum); *Kake Village* v. *Egan,* 369 U.S. 60, 75. Thus, in *Tulee,* the Court stated (315 U.S. at 684) that such a treaty "leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish * * *." The effect of the 1954 Act, we submit, was to terminate the reservation status of the Menominee lands and to subject hunting rights on those lands to the same State conservation regulations which would

apply to Indian hunting rights, if any, outside a reservation.

The result might conceivably be different if the Treaty of May 12, 1854 (Pet. 46) creating the Menominee Reservation had purported to confer hunting rights of greater dignity than those incidental to the ownership of property—rights amounting to a permanent immunity from State regulation.[1] In that event, there might be some basis for the argument that Congress would not have abrogated such treaty guarantees without expressly referring to them. But we find nothing in the 1854 Treaty which would support that construction. The mere fact that the ceded lands were "to be held as Indian lands are held" (Pet. 47) provides no such support. For the quoted language plainly has to do with the nature of the property rights conferred (whether fee simple title; beneficial ownership; or some possessory interest, such as right of use and occupancy), not with the amenability of those rights to State regulation. See Cohen, *Federal Indian Law* (1956 ed.) 604–606. It is not entirely clear what form of tenure Congress intended to grant (*id.* at 606). Even on the most generous interpretation, however, the language of the grant could have

[1] An example of a treaty purporting to confer such immunity, though not confined to hunting and fishing rights, is the Treaty of May 6, 1828, giving the Cherokee Nation:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *

meant no more than that the lands were to be held in fee simple absolute—which, of course, would not, as a matter of treaty guarantee, exempt them from otherwise applicable State regulation.[2]

2. The decision below will have a substantial economic impact on the 3,200 members of the Menominee tribe. Moreover, provisions such as that contained in the Menominee Termination Act, making State laws applicable to the tribe and its members, are contained in other termination statutes.[3] The termination of federal supervision over the Indian tribes is a continuing policy of the Executive Branch and of Congress. As petitioners point out (Pet. 11–12), the issue presented by this case has arisen in litigation involving the Klamath Indians in Oregon, where it has been decided by lower State and federal courts in a manner contrary to the disposition below. The Department of the Interior advises that no other instance of controversy has come to its attention. Whether the question will become a source of future litigation is unclear. In any given case, that will depend not only on the language of the termination statute but also on the nature of the tribal economy, the character of the rights

[2] To the extent that the court below may have adopted a contrary interpretation of the Treaty of 1854, we do not subscribe to its views.

[3] *E.g.*, Klamath Indians, 25 U.S.C. 564q(a); Mixed-Blood Ute Indians, 25 U.S.C. 677v; Western Oregon Indians, 25 U.S.C. 703(a); Alabama and Coushatta Indians, 25 U.S.C. 726; Paiute Indians, 25 U.S.C. 758; Wyandotte Indians, 25 U.S.C. 803; Peoria Indians, 25 U.S.C. 823; Ottowa Indians, 25 U.S.C. 848; Ponca Indians, 25 U.S.C. 980.

which can be asserted by the tribe, and the terms of the treaty allegedly giving rise to those rights.

Respectfully submitted.

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PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES

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PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES

We will have to discuss the merits in order to respond to the Solicitor General's memorandum. At this stage our point will be not to convince the Court that we are right so much as it will be to show that the case is far from the simple one the Solicitor General sees. In fact, the case involves a fundamental, complex and unsettled question of the nature of Indian hunting rights, and after that, the effect of Congressional silence upon such rights in this case. These questions, particularly the former, are well deserving of being settled by this Court.

The Solicitor General takes the simple position that the 1854 treaty did not purport to confer hunting rights greater than those possessed by the ordinary landowner, hence after termination the Indians became subject to

state regulation the same as the ordinary landowner. Under his theory, the question of Congressional intent poses no problem: he concludes that since Congress intended for the state to assume police power over ordinary Menominee activities (which is clear and which we concede), hunting too became subject to state regulation. He concedes that he might see the case differently if the 1854 treaty had purported to confer hunting rights of greater dignity than those incidental to the ownership of property —rights amounting to a permanent immunity from State regulation."

This position no doubt is appealing, partly because it is simple, and partly because the Solicitor General himself has endorsed it. However, it was not the position of either of the courts below, and seems to have been reached without any consideration, much less understanding, of the special status of Indian hunting and fishing rights, as reflected by the cases and other sources.

Throughout our history there has been an awareness of the special rights of Indians to hunt for subsistence without regard to conservation restrictions. For example, the Migratory Bird Treaty between the United States and Great Britain makes certain exceptions for Indians hunting for their own use. So do the Fur Seal Agreement between the United States and Canada, and other international treaties and conventions. So have various acts of Congress.

[illegible]

This is only a reflection of the needs and traditions of Indians—members of a hunting and gathering culture. If, indeed, their treaties are to be understood as that unlettered people understood them, then, to hold lands "as Indian Lands are held" if it means anything means the Indians can gain their subsistence from them as free of restrictions as before the treaty.

In Minnesota, due to special circumstances (a hiatus in Indian title), state game regulations have applied to the White Earth Chippewa Reservation since 1858. Of course the state had no jurisdiction over the persons of restricted Indians on the reservation, but if game illegally caught by such Indians left the reservation, it could be confiscated. But even though state game laws applied on that reservation, *there was an implied exception for Indians' hunting for food.* These cases clearly recognized that Indian hunting rights, even implied ones, were more than mere landowners' rights.

Even off-reservation rights, which are clearly subject to state regulations, have certain implied advantages. For example, the Indians do not need to buy a license, and they have an *implied* exemption from state game laws un-

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ing and fishing rights. And when the Dalles Dam cut off Indian fishing rights in the Columbia River, Congress paid $27,000,000 in compensation therefor. *See Whitefoot v. United States*, ——— Ct.Cl. ———, 293 F.2d 658, 672 (1961), cert. den. 369 U.S. 818.

United States v. Winans, 198 U.S. 371, 380 (1905).

Selkirk v. Stivers, 72 Minn. 335, 75 N.W. 386 (1898). If on the other hand the state's game laws had not applied on the reservation, the game could not be confiscated when it left the reservation. *Cobb v. Gould*, 177 Minn. 398, 225 N.W. 435 (1929); *Tacoma Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).

State v. Cooney, 77 Minn. 388, 80 N.W. 696 (1899); *State v. Jackson*, 218 Minn. 220, 16 N.W.2d 752 (1944).

Tulee v. Washington, 315 U.S. 681 (1942); *State v. McConville*, 65 Idaho 46, 139 P.2d 485 (1943).

less the state can prove that their hunting or fishing will deplete the game or fish."

Implied Indian hunting and fishing rights are nothing new, and in fact inside the reservation they usually *are* implied, since few treaties expressly guaranteed such rights inside the reservation.[9] Other courts, in addition to the courts below, have had no difficulty finding *implied* exclusive hunting or fishing rights on a reservation, and such rights must have been more than those of a mere landowner or else there would have been no occasion for controversy.[10]

This Court has held that where Congress set aside certain islands for the Metlakatla Indians, there was an *implied* provision for exclusive fishing rights in the sur-

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Makah Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951); *Maison v. Confederated Tribes*, 314 F.2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829). Indeed, *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), cert. den. 347 U.S. 937, held that off-reservation treaty hunting rights were not subject to state regulation at all. This holding narrowly missed being adopted by Washington: *State v. Satiacum*, 50 Wash.2d 513, 314 P.2d 400 (1957) (decided 4-4—half the court endorsed the *Schoettler* rule; the other half would have gone much further and adopted the *Arthur* rule).

[9] The only treaty guaranteeing on-reservation hunting or fishing rights of which we are aware is the Yakima Treaty, 12 Stat. 951 (1855). Almost invariably, express hunting or fishing guarantees apply only to off-reservation locations. See the many treaties cited in Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash.L.Rev. 504 nn. 37-41 (1964). This article, incidentally, was written by one of the undersigned attorneys in March, 1963, prior to the appellate decision below, and before his firm had any idea it would be retained in this case. This article was later edited to bring it up to date, and published in April, 1964.

[10] *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933); *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (N.D. Ind. 1940); *United States v. Sturgeon*, 27 Fed. Cas. 1357 (No. 16413) (D.Nev. 1879); Dept.Int., *Federal Indian Law* 497-8 (1958); and the two Klamath cases referred to at p. 11 of our Petition. Compare *Winters v. United States*, 207 U.S. 564 (1908), where the Indians were held to have *impliedly* reserved water rights.

rounding waters.[11] Other courts have extended reservation boundaries *by implication*, contrary to common law, because of Indian fishing activities.[12]

Within the reservation, the Indian hunting and fishing rights have been held exempt even from federal regulation, even where the rights were implied and not express. The Shoshone Treaty did not expressly guarantee hunting rights on the reservation,[13] but nevertheless a Shoshone Indian may hunt on his reservation without regard to the Migratory Bird Treaty.[14] The Quinault Treaty likewise did not guarantee exclusive rights within the reservation, yet fishing regulations promulgated by the Secretary of Interior were held void.[15] The Court said:

> "But the fish and the waters in this stream [within the reservation] do not belong to the state, nor to the

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[11] *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). This is an example of the special status of Indian hunting and fishing rights: a non-Indian cannot have exclusive fishing rights in navigable waters. See cases cited at note 27 of Hobbs, note 9 above.

[12] *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), cert. den. 330 U.S. 827; *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936); *United States v. Slotts*, 39 F.2d 619 (W.D.Wash. 1930). And see *Skokomish Tribe v. Evans*, 320 F.2d 205 (9th Cir. 1963), cert. den. 376 U.S. 943, which recognized the rule but found that the facts did not call for its application.

[13] The treaty did guarantee hunting rights on "unoccupied lands of the United States so long as game may be found thereon," but this is obviously an off-reservation guarantee. 15 Stat. 673.

[14] *United States v. Cutler*, 37 F.Supp. 724 (D.Ida. 1941). While the Migratory Bird Treaty contains certain express exemptions for Indians, see note 1 above, these did not apply in this case.

[15] *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925). This is not to say that Congress lacks *power* to regulate Indian hunting and fishing, because of course it has such power. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But if it confiscated such rights by exercise of such power, just compensation would be. See *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937).

United States; but to the Indians of this Reservation."

In light of this background, it cannot seriously be contended that the Menominees had no more hunting rights than any landowner. The lack of an express treaty guarantee is not controlling; there is no need for such a guarantee within a reservation, and this is all the more true in our case, where the background shows that the very reason the Indians were induced to agree to this particular reservation was because it afforded good hunting. The Menominees were hunters, and their economy —food, shelter, bartering medium—was based on hunting. One can imagine how the Indians would have reacted to the suggestion that they would be subject to restrictions as to seasons, bag limits, species, sex, and hunting methods not in accordance with the nimrod's genteel customs. If Indian treaties are to be construed as the Indians understood them,[9] it must be concluded that "to be held as Indian Lands are held" guaranteed the right of the Menominees to hunt within their reservation as before, and with immunity from outside restrictions, or at least from such restrictions as are designed merely to conserve game for the benefit of sportsmen.[10]

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[9] For similar language, *see Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557 (1930).

[10] *See Menominee Tribe* v. *United States*, 95 Ct.Cl. 232 (1941), quoted in our Petition at p. 5.

[11] *United States* v. *Winans*, 198 U.S. 371, 380 (1905).

[12] We would even concede, arguendo, that the Menominees would have no right to totally deplete a game resource in a zone which included a substantial area outside the reservation. Cf. the *Schoettler* and *Matsch* cases, note 8 above. We note there is little likelihood that continued unrestricted Menominee hunting would have any serious impact on the area's game resources. Furthermore, the leaders of the Tribe have no intention of permitting unrestricted hunting.

The four courts which have considered the very question involved here, including the one with whose conclusion the Solicitor General agrees, were aware that considerably more was involved here than mere landowner's rights.

In the *Klamath* case, the Klamath Treaty expressly guaranteed *fishing* rights, but did not mention hunting rights. Nevertheless the courts held that termination did not deprive the Klamaths of their immunity from state hunting regulations. The courts did not follow the Solicitor General's theory that the only reason the rights were immune before termination was because the state lacked general jurisdiction over the reservation.

Neither did either of the courts below, even though they eventually reached opposite conclusions.[2] The Solicitor General's theory is so obvious and attractively simple that if it were tenable, one would suppose that at least the appellate court below would have relied on it, rather than taking the much more complex approach which the facts and the law demand. The appellate court concluded that the treaty language "to be held as Indian Lands are held" created implied hunting rights, which the court characterized as "*special* hunting and fishing rights."[3] A mere landowner's hunting rights, of course, are not special. Finally, it concluded that Congress "abrogated" the immunity from regulation when it enacted the Term-

[2] The two courts below and the two Klamath cases cited at p. 11 of our Petition.

[3] The Solicitor General realized this, he stated, note 2, "To the extent that the court below may have adopted a contrary interpretation of the Treaty of 1854, we do not subscribe to its views."

The court dwelt briefly, R. 153-4, on whether the "Menominee reservation" was entirely within their aboriginal territory. This would be wholly irrelevant if the only reason the state could not regulate prior to termination was because of its general lack of jurisdiction over the reservation. The court also dealt extensively with the intent of Congress, which would have required no analysis at all if the Solicitor General's theory were correct.

[4] R. 155, emphasis added.

ination Act.[1] "Abrogation" is not a term one would use to describe the mere transference of federal police power to the state.

In summary, our theory is that, in accordance with the sense of *Winans*,[2] the treaty language "to be held as Indian Lands are held" necessarily guaranteed the right of the Menominees to hunt free of outside restriction, state or federal (subject always to Congressional *power* to impose restrictions on payment of just compensation). This freedom from regulation was the only significant incident of the right, since the Menominee Indians separately possess all other incidents by virtue of the fact that they own the land. To cancel this immunity from regulation would be tantamount to a total abrogation of the hunting right. Congress was silent on whether this right was to be thus abrogated, and under well settled principles of Indian law, mere silence would not work an abrogation. This presumption is strengthened by the fact that Congress did not see fit to add express language of abrogation after being advised by officials of the Interior Department that the Termination Act would not affect any treaty rights. The most that can fairly be said of Congress's silence is that it intended to let the courts work out the extent of the hunting right. And that is all we are asking here.

Respectfully submitted,

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[1] R. 159.

[2] *United States v. Winans*, 198 U.S. 371, 380-381 (1905).